Office Supreme Court U.S.
FILED
OCT 9 1901
JAMES H. McKENNEY
Clerk

No. 388.

For Dillon, Hubbard, Dillon & Barnes for Appellees

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 388.

Filed Oct. 9, 1901.

N. O. MURPHY ET AL., Loan Commissioners of the Territory of Arizona,

v.

JAMES L. UTTER ET AL.

Notice of Motion.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

To HON. C. F. AINSWORTH,
Attorney-General of the Territory of Arizona, and
ROCHESTER FORD, ESQ.,
Attorney for Appellants.

Please take notice that the appellees in the above-entitled cause will present to the Supreme Court of the United States, on Monday, October 14, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion to advance the above-entitled cause under and pursuant to the rules of that Court in that behalf made and provided, copy of which motion is hereto attached.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. BARNES,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY ET AL., Loan Commissioners of the Territory of Arizona,
v.
JAMES L. UTTER ET AL.

Motion.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Come now the appellees, by their counsel appearing in that behalf, and move the Court to advance the above-entitled case for hearing.

The grounds of said motion are as follows:

This case has already been once before this Court, and adjudicated by it upon the merits, as will appear by the report thereof (see *Utter* v. *Franklin*, 172 U. S., 416, January 3, 1899), and the same case is now again brought up by the present appeal, and this case is therefore entitled to be advanced under and pursuant to paragraph 4 of Rule 26 of this Court.

This case *reported under the name of Utter* v. *Franklin* is a proceeding by mandamus to compel the Loan Commissioners of the Territory of Arizona to fund certain bonds held by the relators. The question whether it was the legal duty of the Loan Commissioners to fund these very bonds was the very question adjudicated by this Court in this case on the

former appeal. The opinion, which was unanimous given by Mr. Justice BROWN, concludes as follows (172 U. S. p. 425):

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court."

The Supreme Court of the Territory, instead of proceeding to carry out said opinion and judgment of this Court and issue its mandate accordingly, when the cause was remanded, allowed the defendants over the objection of the appellees, to reopen and relitigate the question of their duty to fund the said bonds, and to plead alleged new defenses and produce new evidence, thereby delaying the hearing of the said case from the date of the rendering of said decision of this Court, January 3, 1899, down to June, 1901, at which time the Supreme Court of the Territory of Arizona rendered its judgment in favor of the relators, and ordered, pursuant to the opinion and judgment of the Supreme Court of the United States, the relators' bonds to be funded. From that judgment the present appeal has been taken by the defendants and the present record presents the same question which was adjudicated by this Court on the said former appeal.

The present motion is made in order to ask this Court to advance this case for an early hearing, to the end that the relators may obtain the actual relief to which this Court and also the Supreme Court of the

Territory of Arizona have adjudged them to be entitled, and to the end that further delay may be avoided, and that the relators may have the benefit of the provisions of Rule 26 of this Court, permitting the advancing of cases once adjudicated by this Court on the merits and again brought up on appeal, on motion of either party.

Respectfully submitted.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. BARNES,
Attorneys for Appellees.

SUMMARY OF CONTENTS.

PAGE

Statement of the Case..... 2

Chronological statement of proceedings since the mandate on former appeal went down to Supreme Court of Territory..... 6

Argument.

I.

On the issue of the mandate of the Supreme Court of the United States to the Supreme Court of the Territory of Arizona, reversing the judgment of the Supreme Court of Arizona, and remanding the cause for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, it was the duty of the Supreme Court of the Territory to issue a peremptory writ of mandamus commanding the Loan Commissioners to fund the bonds in question, as expressly directed by the opinion of the Supreme Court of the United States, and the Supreme Court of the Territory had no authority to grant a new trial, a rehearing or a review, or to permit any new defense on the merits to be introduced by amendment to answer or otherwise. Therefore, the judgment finally en-

PAGE

tered by the Supreme Court of the Territory, directing the funding of the bonds, is correct, and should be affirmed without regard to the new defenses and matters which were intruded into the case between the issuance of the mandate of this court and the entry of such judgment 11

Arizona statutes relating to mandamus and pleadings 15

Arizona statutes, unlike statutes in some states, require defendant to state and file at same time, in one answer, all his defenses, both of fact and law 16

When present case was brought originally in Supreme Court of Territory of Arizona, defendants filed their answer, setting up all their defenses of law and fact, and case was heard on the merits in the Supreme Court of the Territory of Arizona and, on the former appeal, in the Supreme Court of the United States, and defendants had no right, on the going down of the mandate of this court, to make their answer over again and set up new and additional defenses 17

The decision of this case by this court on the former appeal was on the merits. Cases in this court cited which establish that the defendants had no right to make new defenses 20

Other pertinent cases in this court 24

Application of this settled doctrine of this court to the present case 26

Further decisions of this court squarely in support of Point I 30

PAGE

Answer to contention of the defendants 32

It would be a strange and novel doctrine for any court to hold that the case could not be heard on the merits, both in a court of original jurisdiction and on appeal, and a decision rendered on the facts, where the parties had, by their pleadings, agreed to the facts, as well as where the parties had, by their pleadings, disputed the facts, and the facts had been found on trial of issues of fact 36

The exact case made by the record on the former appeal, and the effect of the judgment of this court 38

Questions before this court on former appeal 42

Meaning and effect of a remanding for "further proceedings" 45

For the foregoing reasons, the judgment finally entered by the Supreme Court of the Territory, directing the funding of the bonds, is correct, and should be affirmed, without regard to the new defenses and matters which were intruded into the case between the issuance of the mandate of this court and the entry of such judgment 50

II.

The findings of fact by the Supreme Court of the Territory of Arizona show that the $150,000 bonds of Pima county involved in this case were, within the language of the act of Congress approved June 6, 1896, "sold or exchanged in good faith, in compliance with the terms of the

PAGE

act of the legislature [to wit, the act approved February 21, 1883] by which they were authorized" 50

Opinion of Supreme Court of the Territory on this point 64

III

This proceeding was begun against the Board of Loan Commissioners of the Territory of Arizona. The fact that the officers—to wit, the Governor, Auditor and Secretary of the Territory—who were Loan Commissioners at the time the suit was begun have ceased to be such officers, and that a new Governor, Auditor and Secretary have been appointed, who (as the funding act expressly provides) became, by virtue of their being Governor, Auditor and Secretary, the Loan Commissioners of the Territory, does not affect the proceeding. The opinion of the court below on this point is correct 66

The distinction between the case of *United States vs. Boutwell*, 17 Wall., 604, on the one hand, and the cases of *Thompson vs. United States*, 103 U. S., 480, and *Commissioners vs. Sellew*, 99 U. S., 624, on the other hand, is clear and well defined, and the present case is not like the *Boutwell case*, but is like the latter case above mentioned.. 67

The Supreme Court of the United States, on the former appeal, expressly recognized this suit as against the Board of Loan Commissioners,—not against the individuals. The

PAGE

names of the individuals, Franklin and others, were not mentioned in the entire opinion 73

Change of officers immaterial. Appellants were made parties 76

IV.

The statute passed at the session of 1899 by the Legislature of the Territory of Arizona, repealing, or attempting to repeal, Section 1 of the old Territorial funding act of 1887, and Section 1 of the act of the Territory of Arizona of March 19, 1891, had no effect whatever upon the rights of the relators or upon the proceedings in this cause 79

Text of said act of 1899 79

Veto message of Governor N. O. Murphy (one of the defendants), on the ground that the Territorial Legislature had no power to abolish Loan Commission 81

Opinion of Attorney-General Ainsworth, as legal adviser of the Governor, to the effect that the Territorial Legislature had no power to abolish the Loan Commission 82

Opinion of the Supreme Court of the Territory of Arizona in this case to the same effect, all the four judges of that court unanimously holding that the Territorial Legislature had no power to abolish the Loan Commission 85

(1) The said act of 1899 of the Territory does not repeal, or undertake to repeal, the acts of Congress of June 25, 1890, and June 6, 1896, under which these bonds are to be funded 91

PAGE

Said repealing act does not and cannot, under any possible theory whatsoever, have any effect upon the act of Congress approved June 6, 1896, which validated these bonds and provided that they should be funded "as provided in the act of Congress approved June 25, 1890" 91

History of the enactment of the act of Congress approved June 6, 1896, showing that Congress itself dealt directly with the question of validating these bonds, and provided that they should be funded, and that the Legislature of the Territory of Arizona has no power or authority whatsoever to repeal, or in any way interfere with, these express provisions of the act of Congress of June 6, 1896 92

(2) Furthermore, said repealing act of 1899, passed *after* the decision of this court on the former appeal in this case, had no effect in this case, because the statutes of Arizona expressly provided that a repeal did not affect "any right already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken." etc. 98

Memphis vs. United States, 97 U. S., 293 (1887), in point and controlling 100

(3) There is also another conclusive reason why the attempted repeal cannot affect our right to have these funding bonds issued—namely, that our right had accrued, and we had the decision of the Supreme Court of the United States that the bonds be issued, prior to the

PAGE

passage of said repealing act. This right, adjudicated by this court to exist, cannot be taken away by any act of the Territorial Legislature, and this is true, independently of the provisions of Section 2934 of the Revised Statutes of Arizona 110

(4) Furthermore, this so-called repealing act attempts to repeal only Section One of the old Territorial Funding Act of 1887, and Section One of the Territorial Act of March 19, 1891, and does not repeal, or attempt to repeal, the Funding Act of Congress of June 25, 1890, nor any other Act of Congress, nor does it mention any Act of Congress, and it does not even repeal, or attempt to repeal, any other parts of the old Territorial Funding Act of 1887, and of said Act of March 19, 1891, except Section One of the said Act of 1887, and Section One of said Act of March 19, 1891. Therefore, even on the defendants' own theory, all the other parts of the said Funding Act of 1887 and of the said Act of March 19, 1891, except only Sections One thereof, stand unrepealed, and these acts, if so unrepealed, as well as the Acts of Congress, leave in full force and effect sufficient provision for the issuance of these bonds, so that there is full authority for the issuance of the said bonds without looking to the said Sections One of the Territorial Funding Act of 1887 and of the Territorial Act of March 19, 1891 110

V.

PAGE

The Supreme Court of the Territory was correct in holding that the interest and all the interest on these bonds should be funded, as well as the principal of the bonds 115

VI.

The plaintiffs can maintain this proceeding as the holders of these bonds, although they are not the beneficial owners of all the bonds in question 118

VII.

For the foregoing reasons the judgment of the Supreme Court of Arizona ought to be affirmed 124

APPENDIX.

Mandamus Statutes of Arizona 125

Act of Congress of June 25, 1890, italics show the new provisions made by Congress, and the brackets showing the provisions in the Territorial Funding of 1887, which Congress did not adopt 128

Act of Congress approved June 6, 1896 135

Acts of Congress and of the Territory of Arizona Relating to the Bonds in Question Cited in Chronological Order.

Territorial Act, entitled "An Act to promote the construction of a certain railroad," approved **February 21, 1883.** (Reprinted in brief in *Utter vs. Franklin*, p. 61.)

Territorial Funding Act, enacted by the Legislative Assembly of the Territory of Arizona, approved **March 10, 1887.** (Reprinted in brief in *Utter vs. Franklin*, p. 72.)

Act of Congress, entitled "An Act approving, with amendments, the funding act of Arizona," approved **June 25, 1890.** (Reprinted in brief in *Utter vs. Franklin*, p. 78, and in the Appendix to this brief, p. 128.)

Territorial Act, entitled "An Act to provide for funding Territorial, County and other indebtedness, and being supplemental to the Act of Congress entitled 'An Act Approving with Amendments the Funding Act of Arizona,' approved June 25, 1890," approved **March 19, 1891.** (Reprinted in brief in *Utter vs. Franklin*, p. 85.)

Act of Congress, entitled "An Act to Amend an act, entitled 'An Act approving with amendments the funding act of Arizona,' approved June twenty-fifth, eighteen hundred and ninety," approved **July 13, 1892.** (Reprinted in brief in *Utter vs. Franklin*, p. 89.)

Act of Congress, entitled "An Act to amend Section fifteen (15) of an Act approving, with amendments, the funding Act of Arizona, approved June twenty-fifth,

eighteen hundred and ninety," approved **August 3, 1894.** (Reprinted in brief in *Utter vs. Franklin*, p. 90.)

Act of Congress, entitled "An Act amending and extending the provisions of an Act of Congress, entitled 'An Act approving with amendments the funding Act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894," approved **June 6, 1896.** (Reprinted in brief in *Utter v. Franklin*, p. 30; also in this brief, p. 135.)

Territorial Act, entitled "An Act to abolish the loan commissions and to repeal sundry laws relating thereto"—became a law **March 13, 1899.** (Reprinted in this brief, p. 79.)

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 388.

N. O. Murphy, C. H. Akers, and J. W. Vickers, and N. O. Murphy, Governor; C. H. Akers, Secretary, and J. W. Vickers, Auditor, of the Territory of Arizona, Constituting the Board of Commissioners, styled the Loan Commissioners of the Territory of Arizona,

Appellants,

vs.

James L. Utter, and George Albright, Wesley Albright and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief for Appellees.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
WM. H. BARNES,
Counsel for Appellees.

STATEMENT OF THE CASE.

This is an appeal by the Loan Commissioners from a judgment, dated March 22, 1901, of the Supreme Court of the Territory of Arizona (Record, p. 113), granting a peremptory writ of mandamus directed to N. O. Murphy, Governor; J.W. Vickers, Auditor, and Charles H. Ackers, Secretary, the present Loan Commissioners of the Territory of Arizona, being successors in office to respondents, Franklin, Leitch and Bruce, and their successors in office, as such Loan Commissioners, commanding them, upon tender by the plaintiffs of the $150,000 bonds of the county of Pima, and coupons attached, described in the petition, to fund the same by the issuance of bonds of the Territory of Arizona, pursuant to the acts of Congress, citing them.

This same case was before this court at the October Term, 1898, being No. 94 on the docket of that term, and is reported under the name of *Utter vs. Franklin*, 172 U. S., 416. It was decided by this Court January 3, 1899. That was an appeal by Utter *et al.*, holders of the bonds, from a final judgment of the Supreme Court of the Territory, refusing a writ of mandamus for the funding of the bonds. The facts in that case are stated by Mr. Justice BROWN as follows (172 U. S., 416):

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with an act of the Territory 'to promote the construction

of a certain railroad', approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs had been declared, both by the Supreme Court of the Territory and by this court, to be void, and therefore the petition of the relators should be dismissed.

"The petition being denied by the Supreme Court of Arizona, the relators appealed to this court. No opinion was filed in the Supreme Court of the Territory."

Giving the opinion of the court, Mr. Justice BROWN said (p. 417):

"The bonds now held by the relators were declared to be invalid by this court in *Lewis v. Pima County*, 155 U. S., 54, upon the ground that bonds issued in aid of railways could not be considered debts or obligations 'necessary to the administration of the internal affairs' of the county, within the meaning of the act of June 8, 1878, c. 168, 20 Stat., 101.

"Whether the loan commissioners of the Territory can be required to refund these obligations and issue new bonds to the holders thereof, depends upon the effect given to certain legislation upon this subject, both by Congressional and territorial statutes. These statutes were enacted both before and after the decision in *Lewis v. Pima County, supra.*"

After considering the rights of the petitioners under this legislation, this court decided, as stated in its opinion (p. 425):

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

"*The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court*

for further proceedings not inconsistent with the opinion of this court."

When the mandate went down from this court to the Supreme Court of the Territory, that court, instead of immediately entering a judgment ordering the loan commissioners to fund the bonds in question in accordance with the opinion of this court, permitted the defendants to file what they call their "first amended return" (Record, p. 8), setting up and pleading *seventeen new defenses*, and this was permitted, although the defendants had in the first trial full opportunity to plead, and were required by the laws of Arizona to plead, all of their defenses in the one pleading, which, under the statutes of the Territory, must contain any and all demurrers, answers and defenses which the defendants desire to plead. Not only was this required by the laws of the Territory, but the original answer and response to the writ made by the defendants (Record, p. 7) did set up the demurrer of the defendants and also their answer, in which, under the statutes and practice of Arizona, they were required to state *all* their defenses. The petitioners demurred to the answer, and the cause was heard in the Supreme Court of the Territory on the petition, on the demurrer and answer of the defendants, and on the demurrer of the petitioners to the said answer.

On the former appeal the case was heard by this court, and decided on the record on the merits of the case, which was whether the petitioners were entitled to have their bonds refunded, and this court decided "*that it was made the duty of the loan commissioners by these acts to fund the bonds in question*," and remanded the case for further proceedings in accordance with this opinion (172 U. S., 416, 425).

Inasmuch, therefore, as the Supreme Court of the Territory of Arizona had heard the case on the merits, and inasmuch as this court had heard the case on appeal on the merits, and had decided that the bonds should be funded, and remanded the case for further proceedings in accordance with its opinion, it was the duty of the Supreme Court of the Territory immediately to issue its writ of mandamus to the defendants. Accordingly, the petitioners moved (Record, p. 22) to strike from the files the said so-called amended return of the defendants, for the reasons therein stated, namely, that

"1. The same was filed without leave of the court.
"2. By the decision, mandate and opinion of the Supreme Court of the United States in this case no new defenses or 'returns' can be considered by this court.
"3. This court in obedience to the mandate, opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein joined and decided."

The Supreme Court of the Territory, however, overruled the motion and permitted the so-called amended return to be filed. To this ruling the petitioners duly excepted, and their bill of exceptions appears in the record (p. 49).

Inasmuch, however, as the petitioners could, on appeal, take advantage of the error of the Supreme Court of the Territory in permitting the amended return to be filed instead of issuing its writ of mandamus immediately on receipt of the mandate of this court *(Blake vs. McClung*, 176 U. S., 59*)*, the

petitioners decided not to apply to this court for a mandamus to require the Supreme Court of the Territory to carry the mandate of this court into execution, but to proceed with the case in the Supreme Court of the Territory and rely upon correcting any error by appeal. Accordingly, the petitioners filed their reply (Record, p. 43), and their amended reply setting forth copies of records of the board of supervisors of Pima county (Record, p. 50), to the said so-called amended return. The case was heard on these new pleadings. A referee was appointed, testimony was taken, and the Supreme Court of the Territory made its findings of fact (Record, pp. 91–109), and rendered judgment (all of the present appellants being before the Court) awarding a peremptory writ of mandamus directing the funding of the bonds, as above stated (Record, p. 113).

The point of the new defenses urged by the defendants was that the bonds were not issued in good faith in accordance with the act approved February 21, 1883. The defenses also set up that the railroad was not constructed as required by the said act, etc., etc. All of these defenses were found by the court to be without any foundation in fact.

From the judgment of that court the defendants have appealed to this court (Record, pp. 118–122).

Chronological Statement of Proceedings in this Case since the Mandate of this Court Went Down to the Supreme Court of Arizona.

The printed transcript of record now before this court is not arranged in chronological order. To aid

this court in its examination of the record, we make the following brief chronological statement of the case as it appears in various parts of the transcript of record.

An examination of pages 123–127 of the printed transcript shows in chronological order the proceedings which were had in the Supreme Court of the Territory of Arizona upon and after the receipt of the mandate from this court. If there appears (Record, p. 123) that on June 1, 1899, on receipt of the mandate from this court, the attorney for the petitioners suggested the death of Elizabeth D. Voorhies, and moved that George Albright, Wesley Albright and William H. McGinnis, as executors of the last will and testament of said Elizabeth D. Voorhies, be substituted for her [a similar suggestion of death and substitution of executors had already been ordered and made in the Supreme Court of the United States (Record, p. 34); and also moved for a writ of mandamus as prayed for in the petition (see written motion, Record, p. 21)]. The petitioners also moved to strike the so-called amended return from the files (Record, p. 22). The court set the motion for June 2, 1899, and on that date the motion was heard and the court ordered the said motion to be submitted on briefs (Record, p. 123).

On November 1, 1899 (Record, p. 124), the court made an order substituting the executors of the will of Elizabeth D. Voorhies, one of the petitioners, in her place. The court also granted respondents permission to file an amended return and answer, and granted petitioners leave to reply to said answer.

To the ruling of the court granting the respondents permission to file the so-called amended return, the

petitioners duly excepted, and the court signed a bill of exceptions on this ruling (Record, p. 49).

After this ruling of the court permitting the defendants to file the so-called amended return, and after the petitioners had duly excepted to such ruling, the petitioners filed their reply (Record, p. 43) and their amended reply (Record, p. 50), the latter setting forth copies of the records of the board of supervisors of Pima County, showing that the bonds in question were issued in accordance with the act approved February 21, 1883. Also on November 1, 1899 (Record, p. 124), the attorney for respondents moved that the case be referred to some court to take testimony and report to the court. Counsel stated that the issues were not fully made up, and the court stated that until the issues were made up the court could not act.

On January 12, 1900 (Record, p. 124), the attorney for the petitioners moved the Court to set the cause for trial. The attorney for the defendants moved that the cause be referred to the district court for Pima county (the county that issued the bonds in question), and tried before a jury!

On January 16, 1900 (Record, p. 125), the Court ordered that the motion of the respondents that the cause be referred to the district court of Pima county for jury trial be denied, and the court appointed Clinton D. Hoover to take evidence in the Territory, and that he have until March 26, and the Court ordered the cause set for hearing on March 26. Voluminous evidence was taken and was the basis on which the court made its findings of facts (Record, 91–109).

On March 26, 1900 (Record, p. 125), Attorney-General Ainsworth was granted leave to make a motion to dismiss. The motion is set forth in the Record (p. 69).

The alleged ground of the motion was that all the officers against whom the action was commenced had long since ceased to be officers of the Territory, their terms of office having expired. The Supreme Court of the Territory kept this motion to dismiss in abeyance until the cause came on regularly for a hearing, and on the hearing said in its opinion (Record, p. 81):

"We deem it sufficient to say that the weight of authority in the state courts is in favor of the view that the writ of mandamus operates on the office rather than on the individual who occupies the office, and therefore does not abate by a change of personnel in the office, and that no revivor is necessary against a successor of the officer against whom the proceedings were instituted. This also appears to be the rule as followed in the Supreme Court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality. *Thompson v. United States*, 103 U. S., 482; *Commissioners v. Ballou*, 99 U. S., 624. The loan commissioners were—by the statute creating the board—made a continuing body, and the delinquency complained of related to a continuing duty of the commission, and we see no reason why the docrine as applied in the above cases does not apply to the present proceeding (*Hollen Parker, Petitioner*, 131 U. S. 221)."

Also, on the same date, Monday, March 26, 1900 (Record, p. 125), the respondents made a motion for continuance on the ground of illness, want of preparation for trial, etc., and filed affidavits in support of the the same (Record, pp. 70–75). This motion for continuance was granted, and the cause was continued until June 1, 1900 (Record, p. 125).

On March 27, 1900 (Record, p. 75), counsel for the respondents made a motion to dismiss the petition on the alleged ground that the loan commission of Arizona had been abolished by act of the Arizona legislature,

No. 32, of the twentieth Legislative Assembly, passed in 1899, after the decision rendered by this court directing the bonds in question to be refunded. This motion, also, was kept under advisement by the Supreme Court of the Territory until the final hearing, and the opinion of the Supreme Court of the Territory discusses this motion and the alleged grounds for the same, and shows conclusively that the loan commission of the Territory had not been abolished (see opinion of court, Record, pp. 80–84).

On June 1, 1900, counsel for respondents made another motion for continuance, and filed affidavits in support of same (Record, pp. 76, 77). This time the court refused further to continue the case, and ordered (Record, p. 126) that the cause be submitted on briefs, which was accordingly done.

On June 2, 1900 (Record, p. 126), counsel for respondents moved that the petitioners be required to give security for costs, which motion was denied.

On March 22, 1901, the Supreme Court of the Territory decided the cause (Record, p. 126) in favor of the petitioners, and directed that the writ of mandate be issued as prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon, under the provisions of the act of Congress of June 25, 1890.

Judgment to that effect was entered (Record, p. 113).

The court made findings of fact (Record, pp. 91–109).

The opinion of the court is given in the Record, pp. 80–89, and is the unanimous opinion of all the four justices of the Supreme Court of the Territory of Arizona.

On June 1, 1901, counsel for the defendants made a motion for a rehearing (Record, p. 109), also a motion

to reform the judgment (Record, p. 111), which motions were, upon consideration by the court, both denied (Record, p. 127).

Thereupon respondents prayed an appeal to the Supreme Court of the United States (Record, p. 127, pp. 118, 119), which appeal was allowed and perfected (Record, p. 127, pp. 119–122).

After the appeal was taken to this court by the respondents, the petitioners, pursuant to the rules of this court, moved to advance the case under paragraph 4 of Rule 26, as a case once adjudicated by this court upon the merits and again brought up by appeal. Counsel for respondents filed a printed brief opposing this motion. This court, however, made an order advancing the case, and set it for hearing, March 3, 1902.

ARGUMENT.

I.

On the issue of the mandate of the Supreme Court of the United States to the Supreme Court of the Territory of Arizona, reversing the judgment of the Supreme Court of Arizona, and remanding the cause for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, it was the duty of the Supreme Court of the Territory to issue a peremptory writ of mandamus commanding the Loan Commissioners to fund

the bonds in question, as expressly directed by the opinion of the Supreme Court of the United States; and the Supreme Court of the Territory had no authority to grant a new trial, a rehearing or a review, or to permit any new defense on the merits to be introduced by amendment to answer or otherwise. Therefore, the judgment finally entered by the Supreme Court of the Territory, directing the funding of the bonds, is correct, and should be affirmed without regard to the new defenses and matters which were intruded into the case between the issuance of the mandate of this Court and the entry of such judgment.

We made this point in the Supreme Court of the Territory of Arizona when the mandate of this Court went down to that Court, and took a bill of exceptions (Record, p. 49) to the ruling of the Court, which permitted the defendants to make a so-called "amended return."

The brief of counsel for the appellants makes the claim that the court below was justified, after the mandate went down from this court, to go into the question, *de novo*, of the right of the relators to have their bonds funded. This cannot be done. The rule on this point is stated by Mr. Justice BROWN in *Ex parte The Union Steamboat Company*, 178 U. S., 317, 318, 319, where he says (p. 318):

"The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice BALDWIN in an early case upon that subject (*Ex parte Sibbald v. United States*, 12 Pet., 488, 492): 'Whatever,' said he, 'was before the court, and

is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. * * * If the special mandate, directed by the twenty-fourth section [of the judiciary act], is not obeyed or executed, then the general power given to all courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, by the fourteenth section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go,' although an appeal will also sometimes lie (*Perkins v. Fourniquet*, 14 How., 328, 330; *Milwaukee & Minnesota Railroad Co. v. Soutter*, 2 Wall., 440, 443; See, also, *Boyce's Executors v. Grundy*, 9 Pet., 275; *Ex parte Dubuque & Pacific Railroad*, 1 Wall., 69; *Durant v. Essex Co.*, 101 U. S., 555; *In re Washington & Georgetown R. R. Co.*, 140 U. S., 91; *City Bank v. Hunter*, 152 U. S., 512; *In re City National Bank*, 153 U. S., 246; *In re Sanford Fork & Tool Co.*, 160 U. S., 247; *In re Potts*, 166 U. S., 263).

"It is equally well settled, however, that such writ, as a general rule, lies only where there is no other adequate remedy and that it cannot be availed of as a writ of error (*In re Pennsylvania Co.*, 137 U. S., 451; *In re Morrison*, 147 U. S., 14, 26; *Ex parte Railway Co.*, 103 U. S., 794; *Ex parte Baltimore & Ohio R. R. Co.*, 108 U. S., 566; *In re Atlantic City R. R.*, 164 U. S., 633). The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (*In re Sanford Fork & Tool Co.*, 160 U. S., 247, 256, and the opinion of this court may be consulted to ascertain exactly what was decided and settled (*West v. Brashear*, 14 Pet., 51; *Supervisors v. Kennicott*, 94 U. S., 498; *Gaines v. Rugg*, 148 U. S., 228, 238, 244; *Sanford Fork & Tool Co.*, 160 U. S., 247, 256)."

We make and repeat this point here now, not because we have any doubt about the correctness of the judgment of the Supreme Court of the Territory on the facts as found by that Court after it went into an examination of all the questions made by the defendants in their so-called amended return, which that Court permitted the defendants to file over our exceptions, but because, if our proposition on this point is correct, of which we have no doubt, then it is unnecessary for this Court to consider the findings of fact made by the Supreme Court of the Territory, in detail and at length, *for that judgment must be sustained inasmuch as it is a judgment which the Court ought to have entered immediately upon the receipt of the mandate of this Court, without permitting any new defense to be made.*

That this point is open on writ of error or appeal, as well as on an application to this Court for a mandamus to enforce obedience to its mandate, see :

Blake vs. McClung, 176 U. S., 59, (s. c. on petition for mandamus, 175 U. S., 114.
Union Steamboat Company, 178 U. S., 317, and cases there cited.

It is equally open to us to say that the judgment in favor of the petitioners, which the Supreme Court of the Territory ultimately entered, is correct, because it is such a judgment as ought to have been entered immediately on receipt of the mandate. Not to have entered such a judgment would have been error which we would have had a right to have corrected on appeal on our bill of exceptions (Record, p. 49) to the ruling of the court permitting the defendants to make new defenses.

We proceed, therefore, in our argument in support

of the proposition above stated—namely, that the Supreme Court of the Territory should have entered a judgment of mandamus at once upon receipt of the mandate of this court, and should not have permitted new defenses to be introduced by amendment to answer or return.

Arizona Statutes Relating to Mandamus and Pleadings.

We print in the Appendix to this brief the sections of the statutes of Arizona relating to mandamus. These provide, among other things (section 2339, Revised Statutes of Arizona, 1887):

"On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the court may allow, the party on whom the writ or notice shall have been served may show cause *by answer*, under oath, *made in the same manner as an answer to a complaint in a civil action.*"

The statutes regulating procedure in Arizona have adopted the modern system of pleading. They provide, as respects answers, as follows (Revised Statutes, Arizona, 1887, p. 165):

"653. *The pleadings* in all civil suits in courts of record *shall be by complaint and answer.*"

"655. The pleadings shall consist of a concise statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense."

"659. The complaint may contain several different causes of action, and *the answer may contain several different defenses.*"

"668. The complaint shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court."

Revised Statutes, 1887, p. 174:

"734. The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas *shall* be stated in the following order and *filed at the same time:*

"1. Matters denying the jurisdiction of the court.

"2. Matters in the abatement of a suit.

"3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special.

"4. Matters of counterclaim and set-off."

Observe that this Statute of Arizona, unlike the statutes in many states, expressly requires that the defendant shall state in his answer all his defenses, whether of law or fact, and that the same shall all be filed at the same time.

On the commencement of this action, when it was first before the Supreme Court of the Territory of Arizona, the plaintiffs, as required by the statutes above stated, set forth in their petition for writ of mandamus all the facts which entitled them to such writ (See the Petition, Record, p. 1).

To this petition or complaint the defendants were required to make answer, and the statute expressly provides "that the defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time," etc. (See full quotation above).

Therefore, this is not the case, as is erroneously urged by the learned counsel for defendants, where the defendants are required or permitted by statute first put in a demurrer to the complaint and then if demurrer be overruled, they may afterwards be permitted to answer. On the contrary, the statute requires that they must file at the same time all their defenses, "whether of law or fact."

When present case was brought originally in Supreme Court of Territory of Arizona defendants filed their answer, setting up all their defenses of law and fact, and case was heard on the merits in the Supreme Court of the Territory of Arizona, and on the former appeal in the Supreme Court of the United States, and defendants had no right, on the going down of the mandate of this Court, to make their answer over again, and set up new and additional defenses.

Not only does the statute expressly require that all defenses be stated at once, but this is exactly what the defendants did. They filed their answer January 18, 1897 (Record, pp. 6-8), in which they demurred to the petition ; that is, set up a defense of law. The defendants then also set up a further defense of fact ; namely, that these bonds had been adjudged to be invalid in the suit in which one Lewis was plaintiff and the county of Pima was defendant, etc.

If the defendants had any further defense of fact or of law whatever, they were required by the statute to make and file that defense at the same time. If, for example, they had any alleged defense, such as that the bonds had not been sold or exchanged in good faith, in compliance with the terms of the act of the legislature of February 21, 1883, by which they were authorized (which, under the act of Congress approved June 6, 1896, was one of the conditions on which they were to be funded), then such facts should have been pleaded by the defendant in its original return or answer, such facts being at that time fully known to the defendants, and were ultimately found (Rec., p. 93) and adjudged (Rec., p. 113) to show that the bonds were issued in strict compliance with said act of February 21, 1883. Full and ample opportunity was thus given by the statutes for the defendants to set up such a defense. The defendants, however, were content with their answer, and rested on it, and went to judgment on it, as stating their whole case, as the statutes required it should.

The statutes of Arizona as to mandamus (reprinted in full in the Appendix to this Brief) further provide, among other things (sections 2345, 2346, Revised Statutes of Arizona, 1887):

"2345 (SEC. 11.) If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section six, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. *If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements not affecting the substanteal rights of the parties, the court shall proceed to hear, or fix a day for hearing, the argument of the case.*"

" 2346 (SEC. 12). *If judgment be given for the applicant*, he shall recover the damages which he shall have sustained as found by the jury, or as may be determined by the court or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and *a peremptory mandate shall also be awarded without delay.*"

The defendants filed a demurrer to the facts set up in the answer of the plaintiffs, and accordingly (the facts being admitted on the record) *the answer and reply raised only questions of law*, and the court was, therefore, required, under the provisions of section 2345, above quoted, to set the case for hearing, which it accordingly did; and under section 2346, above quoted, the court was required to award "a peremptory mandate without delay." As this court decided on the former appeal, the Supreme Court of the Territory ought, *on the record thus made*, to have awarded a peremptory mandamus; and this Court sent the case back for further proceedings, *according to such decision and opinion*. This court gave no authority to the Supreme Court of the Territory to permit new answers to be filed and new defenses to be made. Obviously, there would be no end of litigation if the defendants were to be allowed to put in some new alleged defense every time a case went back "for further proceedings in accordance with this opinion" (as the mandate runs), and the plaintiff could never get a judgment.

Even if it were to be admitted (and it is not) that the Supreme Court of the Territory might have the right or discretion to permit the defendants to put in a new answer after a hearing and decision on the merits

where a case had not come on appeal to the Supreme Court of the United States, yet a different rule applies after a case has been decided by this Court. This court has many times decided that when a case has once been tried on the merits in a lower court, and the case has come before this court and been adjudicated on the merits, the defendant cannot, when the writ of mandate goes back to the lower court, set up new defenses. If the rule were otherwise, there would never be an end of litigation, for every time a case went back from this court to the lower court the defendant could ask for and obtain leave of the lower court to introduce some new defense, and thus, as the defendants have attempted to do in this case, keep the case going on perpetually with the trial of these alleged new defenses. Such is not the law of this court.

No showing was made in this case that the the facts to be newly pleaded had arisen since the first trial or had been newly discovered, although this would be immaterial as is shown by the case of *Potts, Petitioner*, and other cases in this Court, cited *infra*, p. 21.

The decision of this case by this Court on the former appeal was on the Merits. Cases in this Court cited which establish that the defendants had no right to make new defenses.

The present case stands thus :

The plaintiffs filed their petition in the Supreme Court of the Territory, alleging all the facts necessary to entitle them to a writ of mandamus. This is what

the Supreme Court of the United States expressly decided in this case *(Utter vs. Franklin*, 172 U. S., 416*)*. These facts were not controverted or put in issue by the Loan Commissioners. On the contrary, all these facts were, by the answer of the Loan Commissioners, admitted, as they were not denied. Their answer set up the affirmative defense of the decision in the case of *Lewis vs. Pima County*, 155 U. S., 54. The Supreme Court of the United States decided that the Act of Congress of June 6, 1896, made this defense unavailing, and decided that the plaintiffs are entitled to have a mandamus issued directing the Loan Commissioners to fund the bonds in question.

The merits of this case had thus been decided by the Supreme Court of the United States on appeal. The rule then applies which is stated by Mr. Justice GRAY *In Re Potts Petitioner*, 166 U. S., 263, where he said (p. 267):

"When the merits of a case have been once decided by this Court on appeal, the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review, **or to permit new defenses on the merits to be introduced by amendment of the answer,**" citing the cases.

In that case the plaintiffs filed a bill in equity for the infringement of a patent. The defendants put in an answer denying patentable novelty and infringement. The plaintiffs filed a general replication, and proofs were taken, and the Circuit Court sustained the defense of want of novelty, and entered a final decree dismissing the bill for want of equity. The plaintiffs appealed to the Supreme Court of the United States, which held that the letters patent were valid, and had been infringed, and therefore, as appeared by its

opinion and mandate, reversed the decree of the Circuit Court, and remanded the cause to that court for further proceedings in conformity with its opinion. The Circuit Court entered a decree in conformity with the mandate setting aside its former decree and adjudging that the letters patent were valid and had been infringed, and referred the cause to a Master to take an account of profits. Before any action was taken in the Circuit Court upon the Master's report the defendants filed a petition for a rehearing for newly-discovered evidence, and the Circuit Court granted such petition for rehearing. Thereupon the plaintiffs presented a petition to the Supreme Court of the United States for a writ of mandamus, addressed to the Judge in the Circuit Court, to command him to execute the mandate of this Court, and to set aside the order granting a rehearing, and the Supreme Court of the United States did grant the said writ of mandamus as prayed, holding and stating in its opinion that the Circuit Court had no right to entertain a petition for a rehearing, and that, under the original mandate of the Supreme Court of the United States, which reversed the decree of the Circuit Court and "*remanded the cause to that Court for further proceedings in conformity with that opinion*," the only thing which the Circuit Court had a right to do was to proceed to carry out the mandate by giving its decree and judgment in favor of the plaintiffs, and to take such further steps in the cause as were proper for that purpose, but that *it had no right to grant any new trial or rehearing.*

This decision and the language of Mr. Justice GRAY above quoted are on all fours with the present case, for on the decision of this case, *this Court granted no leave*

"to permit new defenses on the merits to be introduced by amendment to the answer."

In *Supervisors vs. Kennicott*, 94 U. S., 498, Mr. Chief Justice WAITE, giving the opinion of the Court, said (p. 498):

"When this case was here on a former appeal, we decided that the mortgage in controversy was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them (*Kennicott vs. Supervisors*, 16 Wall., 468, 471). These questions are, therefore, no longer open, for it is settled in this court that, *whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit.* Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this court (*Himely v. Rose*, 5 Cranch, 314; *Martin v. Hunter's Lessee*, 1 Wheat. 355; *Browden v. McArthur*, 12 *Id.*, 53; *Sibbard v. United States*, 12 Pet., 492; *Corning v. Troy Iron and Nail Co.*, 15 How., 466; *Sizer v. Manry*, 16 *Id.*, 103; *Roberts v. Cooper*, 20 *Id.*, 481; *Tyler v. Maguire*, 17 Wall., 283."

See, also, *Chaffin vs. Taylor*, 116 U. S., 567; s. c., on former appeal, *Chaffin vs. Taylor*, 114 U. S., 309.

So, also, in the case of *New Orleans vs. Warner*, 180 U. S., 199, this Court said, in a similar case (p. 203):

"It should be stated in this connection that no such distinction between different classes of warrants as is now made was called to the attention of this court when the case was here upon questions certified (167 U. S., 467), or upon the merits (175 U. S., 120). In fact, the present exceptions to the master's report obviously *involve an attempt to set up a new defense* as to a part of these warrants after the merits of the case have been fully considered and disposed of. This is impossible (*Yazoo, &c., R. R. Co. v. Adams, ante*, 1; *Supervisors v. Kennicott*, 94 U. S., 498").

Other pertinent cases in this Court.

Similar decisions have also been rendered in numerous other cases by the Supreme Court of the United States. For example, in *Stewart vs. Salamon*, 97 U. S., 361, the facts were that the Supreme Court had in the case of *Stewart vs. Salamon*, 94 U. S., 434, reversed the decree of the Court below and remanded the case for further proceedings in accordance with the opinion then delivered. After the mandate was filed in the Circuit Court, Stewart and Cutts petitioned for leave to file a plea of *lis pendens*, and an amended answer to the original bill. This petition was overruled, and a final decree was entered in accordance with the mandate. Whereupon Stewart and Cutts appealed to the Supreme Court of the United States; but their appeal was dismissed, the Supreme Court on this point saying (p. 362):

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect."

In the early case of *Ex parte Story*, 12 Pet., 339, it appears (p. 342) that in the original case the cause had been heard and the decree of the District Court reversed, and the case sent back with a mandate from the Supreme Court to the Court below directing the further proceedings to be had in that court. When the mandate went down to the Circuit Court the de-

fendant *made a motion to be permitted to introduce certain other defenses and evidence*, which motion the Circuit Court refused. Whereupon the defendant applied to the Supreme Court of the United States for a writ of mandamus to compel the Circuit Court to receive such further defenses and evidence. This writ of mandamus was refused, the Court saying (p. 343) :

"In the case now before the Court the merits of the controversy were finally decided by this court, and its mandate to the District Court required only the execution of its decree. * * * The facts stated by the defendant cannot, in this stage of the proceedings, form any defense against the execution of the mandate."

In *Gaines vs. Rugg*, 148 U. S., 228, the facts were as follows: A suit in equity had been brought by Gaines against Rugg and others concerning certain lands. Rugg filed his answer, setting up various defenses. The case was referred to a master. On his report a final decree was entered against Rugg. An appeal was taken to the Supreme Court of the United States, which "*reversed the decree and remanded the cause with a direction for further proceedings in conformity with its opinion.*" *After the mandate of this Court was presented to the Circuit Court the defendant Rugg filed in the Circuit Court his exceptions to the decree proposed by the plaintiffs*, and petitioned the Circuit Court for leave to take further testimony in support of his exceptions by way of defense to his title to the land in controversy, and the Circuit Court granted the petition. Thereupon the plaintiff Gaines petitioned the Supreme Court of the United States for a writ of mandamus requiring the Circuit Court to enter its decree in accordance with the mandate and opinion of the Supreme Court of the United States,

and the said writ of mandamus was granted. The Supreme Court said (p. 239):

"The Circuit Court had no right to empower the defendant, as it undertook to do by its order of January 7, 1893, to take further testimony in support of his exceptions by way of defense to the title to the land in controversy, or to set down the cause for hearing upon the issues formed by the pleadings and such exceptions as to the title to the land, or to sustain the exceptions, or to refuse to enter the decree proposed by the plaintiffs, or to refuse to grant to the plaintiffs a writ of possession. * * *

"It is contended for the respondent that the decree of this Court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this Court,' but, also, 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

Application of this settled doctrine of this Court to the present case.

It is obvious that the decisions in the present case in the Supreme Court of the Territory of Arizona and in the Supreme Court of the United States were decisions on the merits of the case, the same as the decisions in the cases above referred to. The plaintiffs stated in their petition for a writ of mandamus all the facts which entitle them to such writ. This was the

opinion of the Supreme Court of the United States. The defendants did not in their answer controvert or put in issue any of the facts stated in such petition, but only demurred to the petition, and set up for an affirmative defense the fact of the decision in *Lewis vs. Pima County*, claiming an estoppel by that decision. The plaintiffs demurred to this affirmative defense. The issues in the case, therefore, were perfectly defined, and by these pleadings the facts were all agreed upon between the parties, and the cause was ripe for final judgment. There was no introduction of evidence, because none were needed any more than if there had been an agreed statement of facts stipulated between the parties. The effect of the pleadings was precisely the same as if there had been such agreed statement of facts. The plaintiffs put in all their case in their petition. The defendants put in all their case in the statement of facts in their answer. This the statutes expressly require. The demurrers thus brought the *case fully before the Court on the issues of law raised upon the facts thus pleaded and agreed upon.*

The case, therefore, falls within the last paragraph of Section 2345, Arizona Revised Statutes, which says:

"If the answer or *answer and reply raise only questions of law* * * * the court shall proceed to hear or fix a date for hearing the argument of the case."

Section 2346 also applies:

"If judgment be given for the applicant, * * * a peremptory mandate shall also be awarded without delay."

The case was submitted to the Supreme Court of the Territory for final judgment, and the judgment ren-

dered by the Supreme Court of the Territory was *a final judgment on the merits*, and as such was appealable to the Supreme Court of the United States.

Riggs vs. Johnson County, 6 Wall., 166.
Davies vs. Corbin, 112 U. S., 36.

When the case came before the Supreme Court of the United States that Court had before it the same record—namely, the petition of plaintiffs stating all the facts on behalf of the plaintiffs, and the answer of the defendants, stating all the facts on behalf of the defendants.

Both parties had their day in court and an opportunity to state all their case, and on these facts as thus pleaded and agreed upon the Supreme Court of the United States rendered its opinion and decision, holding that the plaintiffs were entitled to have a writ of mandamus requiring the defendants to fund the bonds in question.

This, therefore, is a decision on the merits of the case precisely the same as in the cases above referred to. This cause is within the rule above stated by Mr. Justice GRAY (*In Re Potts, Petitioner* 166 U. S. 263, 267, stated *supra*), and supported by numerous decisions of the Supreme Court of the United States—namely :

" When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, *or to permit new defenses on the merits to be introduced by amendment of the answer*," citing the cases.

When this case was sent back from the Supreme Court of the United States to the Supreme Court of the Territory of Arizona with the judgment reversed,

and with directions for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, the only thing for the Supreme Court of the Territory to do was to *go back to that point in the record at which the Supreme Court of the United States decided an error was committed.* The point at which the error of the Supreme Court of the Territory was committed was in its ruling on the reply made by the plaintiffs, the said reply being a demurrer to the answer made by the defendants. The Supreme Court of the Territory committed error in overruling that reply and the demurrer therein contained, and in refusing to award a mandamus as prayed in the petition of the relators. The Supreme Court of the United States so decided. The only thing for the Supreme Court of the Territory to do, therefore, was to sustain that reply and the demurrer therein contained by rendering judgment in favor of the plaintiffs. The Supreme Court of the Territory had no right to ignore this reply, and go back to a preceding pleading—namely, the answer of the defendants—and permit the defendants to amend their answer. That would not be a "*further* proceeding" in the case; but it would be an attempt on the part of the defendants to make a new case, and introduce new defenses on the merits, which the Supreme Court of the United States in numerous cases has decided cannot be done.

The rule is well settled that, when an error is committed in the trial of a cause, and the cause is sent back for further proceedings, the lower Court can only go back to the point at which the error was com-

mitted, and then the cause proceeds with the error corrected.

In this case, so proceeding from the point at which the error is corrected, the only thing for the Supreme Court of the Territory to do is to render judgment for the plaintiffs.

Furthermore, the statutes of the Territory of Arizona provide a complete code as to mandamus proceedings, and they do not provide or attempt to provide for any new trial or any amendment to the answer of the defendants in a case like the present.

The only provision for a new trial provided by the Code as to mandamus proceedings is where the cause has once been tried by a jury. But where the case has, as in this case, been tried by the Court without a jury (that is, upon the facts agreed to in the pleadings of the plaintiffs and the defendants), no new trial is authorized or permitted.

Further decisions of this Court squarely in support of Point I. *(supra*, p. 11*).*

But, even if the statutes of Arizona permit a second trial and the making of a new case by the defendants in their answer, this rule would not apply after the case has gone to the Supreme Court of the United States on the merits, and a decision has been had on the merits in that court.

This proposition has been expressly decided by the Supreme Court of the United States in the case of *Ex Parte Dubuque*, 1 Wall., 69. The Code of Iowa provided that, after a trial in ejectment and verdict and judg-

ment for one of the parties, there might, in the discretion of the Court, *be a second trial, notwithstanding the first trial, verdict and judgment.* A case in ejectment was tried and verdict rendered and judgment entered, and the case went to the Supreme Court of the United States, where the judgment was reversed on the merits, and the case sent back for further proceedings. There was an attempt made by one of the parties to have a second trial. The Supreme Court of the United States, while admitting that such a trial might have been had ordinarily under the provisions of the Code of Iowa above mentioned, distinctly held that, where the case had once gone to the Supreme Court of the United States on the merits and a decision rendered therein, no new or second trial could be had, even under the provisions of the Code of Iowa expressly granting such new or second trial in ordinary cases. The United States Supreme Court said *(Ex parte Dubuque*, 1 Wall., 69, 73*)*:

"In granting the new trial the District Court seems to have been governed by two reasons: First, because the statutes of Iowa prescribed that a second trial may be had of course in actions brought for the recovery of real estate; and, secondly, because the court below had the power, after the cause was presented there by a mandate from this court and the judgment of reversal entered, to hold that the cause stood on the same footing that it would have done had the District Court entered the judgment for the defendant before the cause was brought up to this court. And in that case it is true the District Court could have granted a new trial at its discretion * * * The District Court had no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate.

"We order that a writ of mandamus do issue to the Circuit Court of the District of Iowa commanding it to vacate and erase the order granting a new trial in the aforesaid cause, and that a judgment be entered in conformity to the mandate of this court."

Therefore, we say that, even if the Code of Arizona had permitted a second trial in a mandamus proceeding where the case was tried, as this one was, before a Judge and without a jury, yet, under this decision of the Supreme Court of the United States, no new or second trial could be had or new defenses introduced in the present case, *since this case has gone to the Supreme Court of the United States and been decided there on the merits*, and the judgment reversed and the case sent back for further proceedings in accordance with its opinion. But, as we have above shown, the Code of Arizona, with respect to mandamus proceedings, does not authorize or permit any second trial in a case which is tried on issues of law before a Judge and without a jury.

It specifies the only case in which a new trial is permitted in mandamus proceedings—namely, where a case is tried before a jury, and this specification permitting a new trial in such a case amounts to a prohibition of a new trial in all other cases, if such prohibition were needed, under the well-known maxim *expressio unius est exclusio alterius*. Of course, no such prohibition is needed, since no new trial can be had, and no amendments made, and no new defenses put in unless the statute expressly authorizes this to be done.

Answer to contention of the Defendants,

In the brief filed in the Court below by counsel for the loan commissioners, they quoted certain provisions of the Revised Statutes of Arizona—to wit, paragraphs 667, 673 and 758—as to amending pleadings in ordinary actions. These paragraphs clearly have no applica-

to a special proceeding where there is a separate and complete code of procedure prescribed, such as the mandamus proceeding, as to which the Revised Statutes of Arizona provide a complete code of procedure.

Moreover, these provisions permitting amendments would have no application in a case like the present, where the case has been tried on the merits and a decision rendered by the Supreme Court of the United States on the merits, as we have above shown. The learned counsel for the loan commissioners were in error in stating on their said brief that the "present stage of the action is simply that a demurrer to the writ has been overruled, and it is now open to the respondents to answer to the merits and have the issues of fact tried as provided by law." The facts are that the defendants *did answer on the merits* (and they were by the statutes of Arizona expressly required to put in *all their defenses of law and fact in the one pleading*), and that the plaintiffs in their reply demurred to such answer, and this demurrer was wrongfully overruled by the Supreme Court of the Territory, and the Supreme Court of the United States has decided that the demurrer should be sustained, and it is impossible for the defendants to go back of that demurrer and amend a preceding pleading; namely, the defendant's answer.

The learned counsel for the Loan Commissioners on their said brief referred to the case of *In re Sanford Fork and Tool Company*, 160 U. S., 247. An examination of that case will readily show to this Court that the decision of the Supreme Court of the United

States therein is in exact accordance with the other decisions of the Court and with the principles here stated; namely, when a case goes to the Supreme Court of the United States it decides where the lower Court first committed error, and that, when the judgment is reversed and the case remanded for further proceedings, *the trial Court goes back to that point in the case at which the error was committed, and proceeds from that point.* In that case the plaintiffs filed exceptions to the answer, which exceptions were sustained by the Circuit Court, and decree thereupon rendered in favor of the plaintiffs. The Supreme Court of the United States says (*In re Sanford Fork and Tool Company*, 160 U. S., 247, 257, 258):

"When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. *But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for a final decree.* * * * The Circuit Court, upon sustaining the exceptions, could not * * * enter a final decree against the defendants."

The Supreme Court, therefore, held that, when that Court had reversed the judgment of the lower Court, which judgment sustained the exceptions to the answer, and had sent the case back to the lower Court for further proceedings, the lower Court should begin where the error was committed—namely, the exceptions to the answer should be overruled, and the cause should thereupon proceed from that point.

That decision is exactly in accordance with what we maintain in the present case. **Our cause was ripe for final decree** under the procedure prescribed by the statutes of the Territory of Arizona, Section 2345, above quoted, which provides:

"If the answer, or answer and reply, raise only questions of law * * * the court shall proceed to hear or fix a date for hearing the argument of the case."

Section 2346:

"If judgment be given for the applicant * * * a peremptory mandate shall also be awarded without delay."

This case is, therefore, within the language of Mr. Justice GRAY above quoted from the opinion in *Sanford Fork and Tool Company, supra*, where he says:

"When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party."

That, under the practice in equity, is like the present case, where the plaintiffs stated their facts in their petition, the defendants stated their facts in their answer, and the plaintiffs in their reply demurred to the defendants' answer, and the whole case was thus presented for final decree on the issues of law under the practice prescribed by the Code of Arizona, Sections 2345 and 2346, quoted *(supra*, pp. 18–19*)*.

This court in the case of *In re Sanford Fork & Tool Company, supra*, expressly distinguishes that case from the cases above cited by us, Mr. Justice GRAY saying (p. 259):

"The case is quite different in this respect from those in which *the whole case*, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal as in the cases principally relied on by the petitioner *(Stewart v. Salamon*, 94 U. S., 434, and 97 U. S., 361; *Gaines v. Rugg*, 148 U. S., 228; *Ex Parte Dubuque & Pacific Railroad*, 1 Wall., 69; *In re Washington & Georgetown Railroad*, 140 U. S., 91*)*.

"It must be remembered, however, that *no question once considered and decided by this court can be re-examined at any subsequent stage of the same case.*"

The learned counsel for the Loan Commissioners on their brief filed in the court below also referred to certain cases (*Stewart vs. Salamon*, 97 U. S., 361, and others), saying with regard to those cases that "all had been heard on their merits; that is, on the facts." That is true of the present case.

It would be a strange and novel doctrine for any court to hold that the case could not be heard on the merits, both in a court of original jurisdiction and on appeal, and a decision rendered on the facts where the parties had agreed by their pleadings to the facts, as well as where the parties had by their pleadings disputed the facts and the facts had been found on trial of issues of fact.

The very purpose of pleadings is to enable the parties to agree upon the facts if possible, and thus present the case to the Court upon the facts so agreed upon. A case thus tried is just as much tried upon the merits and is just as conclusive as if the parties had by their pleadings disputed the facts and left them to be found by the Court. It is just as much a trial upon the merits where the facts are thus agreed upon in the complaint and answer and demurrer to answer, as in the present case, as if the parties had made a stipulation agreeing that the facts contained in the said complaint and in the said answer were true. That is the legal and actual effect of the pleadings. In all of the cases cited on our brief *supra* it was urgud by the defendant that there had not been a trial upon *all*

the facts, and the attempt in each case was for the defendant to set up some new fact that had not been brought forward in the original answer and in the original trial. That is precisely what the defendants in this case were permitted to do. They say that the case has not been heard upon *all* the facts. They want to bring in some more facts. They cannot do it in this case any more than the defendants could do it in the cases above cited, and for the very same reasons; they have had their day in court, and an opportunity to answer as well as the duty fully on the merits.

A party to a cause is not permitted to put forward a part of the facts in his answer, and then wait until the case is decided on its merits against him on such answer and state that he has in reserve certain other facts which he did not put in his answer, and which he now asks an opportunity to put in. This operation if permitted might be repeated by the defendants in a case from time to time for an indefinite period, and no result be ever arrived at in the litigation. The rules of law and the decisions of the Supreme Court of the United States do not permit any such course. There would never be an end of litigation if such a course were permitted.

In the case of *Ex parte Story*, 12 Pet., 339, above referred to, the Court says (p. 343):

"The facts stated by the defendant can not, in this stage of the proceedings, form any defense against the execution of the mandate."

This implies that the facts, if properly pleaded originally at the proper time, might have formed some defense to the action—that is, the decision of the Court

in that case was that such new defenses and new facts could not be introduced after the case had been heard upon the merits, whatever might be the pertinency or relevancy of such facts if they had been originally pleaded.

In fact, that is the very point of all the cases—there has been a struggle to have a new trial, to introduce new issues, after the Supreme Court of the United States had decided on the rights of the parties to the case as they had made them on the record. See the language of the Supreme Court of the United States in the case of *Ex Parte Story*, 12 Pet., 339, above quoted:

"The facts stated by the defendant cannot, *in this stage of the proceedings*, form any defense against the execution of the mandate."

The exact case made by the record on the former appeal, and the effect of the judgment of this Court.

If a careful study is made of the record of the present case in the Supreme Court of the United States on the former Appeal, it will appear that by the petition and Exhibit A thereto attached and made a part thereof the plaintiffs allege:

(*a*) That the bonds held by them were issued by virtue of the authority of the Act of February 21, 1883.

(*b*) A copy of the bond of the County of Pima is set out, by which it appears that it is negotiable; and each bond recites that it is "issued by the board of supervisors of said county of Pima under and by virtue of the act of the legislature, entitled" (giving the title

of the Act of February 21, 1883). It also recites that "this bond is one of a series of 200, issued in pursuance of said act and exchanged for a like number of bonds of the railroad company of like amounts, bearing like interest, and running for a like time as the bonds of which this is one." Observe that this recital is that the bond is issued "*under and by virture of* the act of Feb. 21, 1883." As to the effect of this recital on the rights of the holder of the bond as against the county see the case of *Evansville vs. Dennett*, 161 U. S., 434, and *Gunnison County vs. Rollins*, 173 U. S., 255. The bond also specifically recites that it is issued in pursuance of the said Act of February 21, 1883, and exchanged for a like number of bonds of the said railroad company of like amounts, &c.; in short, reciting the requisites under the said Act of February 21, 1883, of the right of the said railroad company to demand and receive said county bonds in exchange for its own first mortgage bonds. The bond also recites that this exchange has been made *under and in pursuance of* the terms of the Act of February 21, 1883. The bond containing this recital is signed by the Chairman and Clerk of the Board of Supervisors and by the County Recorder, and is attested by the seal of the county. Under the decisions of the Supreme Court of the United States, this is a determination by the county authorities, who are the tribunal authorized to make the determination, that the facts there recited are true, and that all the conditions required by the Act of February 21, 1883, for a lawful exchange of bonds, have been met and complied with.

The petition of the relators, after setting out the bond, alleges in point of fact (Record, p. 2) that the county delivered these bonds "with the coupons

attached to the Narrow Gauge Railroad Company, as provided for in the said Act of February 21, 1883, *in exchange* for a like number and denomination of the bonds of the company with like coupons thereto attached." It then alleges a sale of the said bonds by the railroad company in the open market, in good faith, for a valuable consideration, and their purchase by the plaintiffs in good faith and for a valuable consideration. The plaintiffs then allege the demand for the funding and the refusal as set forth in Exhibit A attached to the petition.

To the petition containing this statement of facts the defendants were required by express statute of Arizona to make their answer, setting forth in one pleading *all their defenses of law and fact.* In considering that answer the defendants found that there was not a single *fact* stated in the petition or recited in the bond or in Exhibit A attached to the petition which they could deny in point of fact, and therefore they demurred to the same. The defendants had, however, one *fact* on which they relied, which did not appear on the face of the petition and Exhibit A thereto attached, and that fact was that the county had been sued by one Lewis on the coupons on these very bonds, and that such proceedings were had in the said cause as that by the judgment of the Territorial Supreme Court and, on appeal, by the judgment of the Supreme Court of the United States, the said bonds were declared to be void, and the defendants set up this adjudication in the second division of the answer as a defense to the relief sought by the petitioners, *and they set up no other defense on the facts.* The "facts" stated in this defense—namely, that such a suit had been brought by Lewis against Pima County, and that the result of that suit

was as stated in the second division of the answer—the petitioners could not contest, and therefore they demurred to the same.

The effect of all this was that the defendants said, "On the face of this record we admit every fact that the plaintiffs state as to those bonds;" and the plaintiffs say, "We admit every fact stated in the second defense pleaded in the answer;" and they say in effect by the demurrer: "What of it?" The case is then submitted to the Court for its judgment upon the legal rights of the parties on the agreement reached by the pleadings that every material fact stated in the petition and Exhibit A is true, and that every material fact stated in the second defense of the answer is true, and they ask the judgment of the Court whether, if these facts are thus true, the plaintiffs are entitled to the mandamus which they seek. The legal effect of what was done is just precisely the same as if the two parties to this record had signed an agreed statement of facts as follows, to wit:

It is agreed that all the facts stated in the plaintiffs' petition are true; it is also agreed that all the facts stated in the defendants' answer are true; and we thereupon submit to the Court the question thereon arising whether the plaintiffs are or are not entitled to the writ of mandamus, and judgment may go according as the Court may decide this question.

This was the record as the parties made it, and it went to the Supreme Court of the United States, and that Court held that on these facts the plaintiffs were entitled to have their bonds funded, and that the mandamus ought to have been issued, and ordered the cause remanded accordingly, without any right being given to amend the pleadings and to make a new case and have a new trial. On this record

the defendants had no right, on the going down of the mandate of this Court, to amend pleadings, make a new case and new defenses, introduce new evidence, have a new trial, and reopen the whole matter anew as if there had never been any case at trial. If they could get leave to amend and introduce a new defense, there would be no end to litigation. We wish to repeat that this is precisely what the Supreme Court holds, in the cases above cited in our brief, cannot be done. There must be an end to litigation some time; and, when both parties have had a full and free opportunity to put in their claims and defenses, and the case has had a decision on the merits as they deliberately made it, the defeated parties cannot go back again and from time to time raise such new defenses as they may think possibly will help their case.

Questions before this Court on former appeal.

This ought to end the discussion, but we call attention also to the fact that the counsel for the county, as well as the Supreme Court, understood the case as we have here presented it, and this is perfectly manifest from the brief of Mr. C. W. Wright in this case on the former appeal for the appellee in the case of *Utter vs. Franklin*, the former appeal, and from the opinion of the Supreme Court of the United States. The county in that brief claimed substantially three things:

First. That these bonds were not within the language of the Act of Congress of June 6, 1896, and that they were not "outstanding bonds" within the

meaning of that act, for the reason that it could not be said, as counsel contended, that these bonds were "outstanding," when they had, before that time, been solemnly held by the Supreme Court of the United States not to be valid. This position is answered by the Supreme Court of the United States in the opinion in *Utter vs. Franklin*, 172 U. S., at page 423.

SECOND. The county also made the point that it was not in the power of Congress to validate bonds which had been held void by the Supreme Court of the United States. The Supreme Court of the United States overruled this point as will be seen by its language on pages 423 and 424.

THIRD. And the county also made the point that, under the funding legislation, the petitioners had no right to have the bonds funded, because there had been *no official demand* by the county authorities therefor. The Supreme Court of the United States overruled *this* point, and, referring to the legislation, Territorial and Congressional, on the subject, and particularly to the Act of Congress of June 6, 1896, said:

"Construing this [to wit, the Act of Congress of June 6, 1896] in the light of surrounding circumstances, and, particularly, in view of the memorial, it is entirely clear that it was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and, to put the matter still further beyond question, they are expressly declared to be legal and valid."

That was said in this very case with reference to these very bonds, and is the judgment of the Court as to the effect of the Act of June 6, 1896, upon these bonds.

As to this point that there was no official demand, the Supreme Court says that it is not well taken, because the Territorial Act of March 19, 1891, does not require any such demand, nor does the Act of Congress of June 6, 1896. With reference to this act the Supreme Court of the United States says (p. 425):

"The act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities *shall* be funded with the interests thereon," etc. (The court italicized the word *shall*.) And the opinion concludes: "We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that the order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court."

What can be more inconsistent with the opinion of the Supreme Court that it was made the duty of the Loan Commissioners by these acts to fund the bonds in question than for the Territorial Court now to say: "Why, you need not perform that duty, and we will go on and make an investigation to see whether you ever ought to perform it."

The Supreme Court of the United States regarded this record in precisely the same light as we are here presenting it—namely, that the facts had all been agreed to on behalf of the petitioners and on behalf of the Loan Commissioners, and that the whole case was submitted to the Territorial Court on the merits, and afterwards came before the Supreme Court of the United States on the merits. For these reasons, the Supreme Court of the United States, in rendering its decision, does not undertake to send the case back for a new trial, nor does it send the case back to per-

mit any new issues to be raised. The facts had all been agreed upon, and there was no occasion for doing any such thing. On the contrary, the Supreme Court of the United States says: **"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question."** Here is the decision of the Supreme Court of the United States on the merits on a record before them, and no suggestion is made by them and no permission granted by them for a new trial, or any amendments of the pleadings, and the only thing to be done is to take such further proceedings in the Supreme Court of the Territory as will give effect to the decision of the Supreme Court of the United States, and no effect can be given to that decision unless the duty there declared to fund these bonds is performed by the defendants. The Supreme Court of the Territory should merely have gone back to the point at which it made its error in holding on the record that the plaintiffs were not entitled to have their bonds funded. Taking up the case at that point, the Territorial court should then have entered its judgment order obediently to the judgment of the Supreme Court of the United States, that the plaintiffs are entitled to have their bonds funded and ordering the defendants to fund them, and accordingly give effect to the decision and judgment of the Supreme Court of the United States.

Meaning and effect of a remanding for "further proceedings."

It would not accord with the practice of the Supreme Court of the United States for it to issue its mandate

direct to the Loan Commissioners to fund these bonds, and, according to the practice of the Court, it sent the case back to the lower Court to have it issue the necessary mandamus. That is what is meant by the mandate, "to take further proceedings not inconsistent with the opinion of this Court." In other words, the Supreme Court of the Territory was to bring the case to a conclusion by rendering, without any further trial, the judgment which the Supreme Court of the United States has decided must be rendered and which the plaintiffs are entitled to have rendered. The words "further proceedings" do not mean the opening up of the case anew or granting a new trial or new defenses or any such thing, as is shown by all the cases cited on our brief, but they mean only additional proceedings commencing where the error was committed.

If, therefore, the defendants wished to have the pleadings amended and a retrial they should have asked the Supreme Court of the United States in remanding the case to make provision to this end; or, after the decision of the Supreme Court of the United States, should have filed a petition for a rehearing and asked the Court to have its judgment modified so that when the case was remanded to the Territorial Court the defendants might file additional pleas and have a new trial.

A moment's reflection will show that, if any other rule were adopted, and if it were possible for a defeated party, after having a decision rendered on the merits of the case, to go back and begin the case all over again, introduce new defenses, new testimony, have a new trial, and make the case as if it had never been decided, then there would be no end of litigation.

In the questions above considered there is no difference in the interpretation and effect to be given to the decision and mandate of the Supreme Court of the United States when rendered as respects a decision of the Supreme Court of a Territory from what there is when rendered as respects a decision of a Circuit Court of the United States.

Section 702 of the Revised Statutes of the United States provides as follows:

"The final judgments and decrees of the supreme court of any Territory. * * * may be reviewed and reversed or affirmed in the Supreme Court upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court."

The Supreme Court of the United States in sending down its formal mandate, whether it reverses the judgment or whether it affirms the judgment, always remands the cause "*for further proceedings.*" This is the usual formal ending of the mandate whether a judgment be reversed or whether it be affirmed. But, unless it be expressed elsewhere in the body of the mandate that there is to be a new trial permitted or the case otherwise opened up from the beginning, the words mean only that there shall be further proceedings only from the point where in case of reversal the lower court committed its error, or in case of affirmance where the lower court entered its judgment, the further proceedings mean the issuance of execution, &c., &c.

Blake vs. McClung, 176 U. S., 59, and *Blake vs. McClung*, 172 U. S., 239, is a case in point, where the mandate was, as usual, "*for further proceedings not inconsistent with this opinion.*"

When that case was first before the Supreme Court of the United States it came there on writ of error to the Supreme Court of the State of Tennessee, bringing up for review a final judgment sustaining the validity of a statute of the State of Tennessee, which, as construed by the Supreme Court of the State of Tennessee, undertook to give to the residents of that state a priority in the distribution of assets over creditors who were residents of any other state. The Supreme Court of the United States decided and stated in its opinion that such preference was invalid as against individual persons, citizens of the State of Ohio, and concluded its opinion as follows (p. 262) :

" As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and *the cause remanded for further proceedings not inconsistent with this opinion ;* and it is so ordered."

After such decision by this court the case was again heard by the Supreme Court of Tennessee, on motion of Blake and others for a decree in conformity with the opinion and mandate of this court (see 176 U. S., 59, 65). The Supreme Court of Tennessee entered a decree which was not in conformity with the opinion of the Supreme Court of the United States. Thereupon Blake sued out a writ of error to the Supreme Court of the United States a second time, and this court, after repeating what was stated in its former opinion, and on the basis of such former opinion, again reversed the case and remanded it for further proceedings in accordance with its former opinion. This court said (p. 67) :

" We are constrained to hold that the judgment of the Supreme Court of Tennessee is *not in conformity with the opinion and mandate* of this court. *The*

thought expressed in our former opinion was," &c. * * * (p. 68): "It is not within the province of this court to prescribe the form of a decree to be entered for the distribution of the assets in question. But it is both its province and duty to adjudge, in accordance with the supreme law of the land, as we now do, that the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee."

In that case of *Blake vs. McClung*, just as in the present case, this court had plainly *pointed out in its opinion on the first writ of error what the lower court ought to do.* The lower court, in the Tennessee case, had disregarded the opinion and mandate of this court, and on writ of error this court again reversed the judgment and remanded the cause for further proceedings consistent with its opinion. So in our present case, on the former appeal this court *said that the bonds in question must be funded*, and reversed the judgment for further proceedings *in accordance with its opinion.*

For the foregoing reasons the only thing for the Supreme Court of the Territory of Arizona to do when it received the *opinion and mandate* of this court was to enter a judgment immediately in accordance with such opinion and mandate, and not to permit new defenses to be introduced and to consider whether on such new defenses a judgment ought or ought not to be entered directing the funding of the bonds. This court in its opinion had said the bonds must be funded, and that ended the matter.

The *right* of the testators to have their bonds refunded was the very right which was contested in the former appeal, and the relators' said *right* was adjudged and established by this Court.

Therefore, the judgment finally entered by the Supreme Court of the Territory directing the funding of the bonds is correct, and should be affirmed, without regard to the new defenses and matters which were *intruded* into the case between the issuance of the mandate of this court and the entry of such judgment.

II.

The Findings of Fact by the Supreme Court of the Territory of Arizona show that the $150,000 bonds of Pima county involved in this case were, within the language of the act of Congress approved June 6, 1896, "sold or exchanged in good faith, in compliance with the terms of the act of the legislature [to wit, the act approved February 21, 1883], by which they were authorized."

Of course on this appeal the Findings of Fact of the Supreme Court of the Territory of Arizona are conclusive as to the facts.

Holloway vs. Dunham, 170 U. S., 615.
Marshall vs. Burtis, 172 U. S., 630, 634–635.

In order to show to this court that these Findings of Fact by the Supreme Court of Arizona established conclusively that these bonds were sold or exchanged in good faith, in compliance with the terms of the act of the legislature by which they were authorized, we have placed below, in parallel columns, the requirements of the act of February 21, 1883, and the corresponding Findings of Fact by the Supreme Court of the Territory.

"SECTION 1. Upon information in writing to the Chairman of the Board of Supervisors of the Pima County, Arizona Territory, by the President of the Arizona Narrow Gauge Railroad Company, the corporation of that name, which filed its articles of association with the Secretary of said Territory, on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said County of Pima, according to the provisions of this Act, it shall be the duty of said Chairman, and he is hereby directed, to call a meeting of said Board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed, to meet within five days at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds

[Findings of Fact, No. I., Record, p. 91.]

"That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' filed its articles of association with the secretary of the said Territory on the 23rd day of November, 1882," &c.

[Findings of Fact, No. II., Record, p. 95.]

"That the president of the Arizona Narrow Gauge Railroad Company mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' on April 27, 1883, gave information in writing to the chairman of the board of supervisors of Pima

of said County, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached, shall be signed by said Chairman and the Clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the Clerk of said Board to the County Treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said County Treasurer shall receipt to the said Clerk for the said bonds."

county, Territory of Arizona, that the said railroad company was ready to exchange bonds with the said county of Pima according to the provision of the said act approved February 21, 1883."

[Findings of Fact, No. III., Record, p. 95.]

"That upon such information in writing being given to the chairman of the board of supervisors of Pima county, Territory of Arizona, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, that the said railroad company was ready to exchange bonds with the said county of Pima, according to the provisions of the said act approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' the said chairman of the said board of supervisors called a meeting of the said board to be held within five days after the receipt of the said notification, namely, to be held at the office of the said board at the court-house on Monday, the 30th day of April, 1883, at ten o'clock a. m., to take action on said notice and application."

[Findings of Fact, No. IV., Record, p. 95.]

"That the board of supervisors of the county of Pima, Territory of Arizona, met at their office in the court-house at the county seat of said county on Monday, April 30, 1883, at ten o'clock a. m., pursuant to the call by the chairman of the said board issued April 27, 1883, made as prescribed in section 1 of the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' to consider the application of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, for an exchange of bonds in accordance with the provisions of the said act. That the said board adjourned from time to time until May 5, 1883, on which day the following proceedings were had, as appears by the minute entries of the said board; 'The board resumed the consideration of the application of the Narrow Gauge Railroad Company for exchange of bonds. After argument for and against the proposition, Supervisor Toole offered the following: Ordered, that the board, having

duly considered the application of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road ; it is ordered that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied. The motion not being seconded was not entertained. Supervisor Samaniego presented for the consideration of the board the following order : ' Ordered, $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled " An act to promote the construction of a certain railroad," approved the 21st day of February, A. D. 1883, be issued and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of

the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form. The question being upon the adoption of the order, those voting the affirmative were Supervisors Otis and Samaniego; those voting the negative, Supervisor Toole. So the motion passed and was adopted.' That on May 19, 1883, the said board of supervisors of the county of Pima ordered that the clerk be instructed to prepare forms of bonds to be ready for the inspection of the board on May 21, 1883. That on May 21, 1883, the records of the board of supervisors of said county show that the clerk submitted forms of such bonds and that the said board ordered them to be lithographed. That on August 2, 1883, the said board made the following order, to wit: 'In the matter of exchange of bonds with the Arizona Narrow Gauge Railroad Company; ordered that the respective county officers required by law so to do, sign and seal said bonds, and thereupon the clerk of the board is especially instructed to de-

liver said bonds to the county treasurer, taking his receipt therefor.' That there was filed with the clerk of said board August 3, 1883, over the signature of W. J. Osborne, clerk, and signed J. C. McElliot, county treasurer, the following: 'Tucson, A. T., August 18, 1883. Received of William J. Osborne, clerk of the board of supervisors of the county of Pima, two hundred (200) bonds of one thousand (1,000) dollars each, numbered from one to two hundred inclusive, of the county of Pima, for issue to the Narrow Gauge Railroad Company of Arizona, as provided by law.' That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings."

The bonds involved in these mandamus proceedings conform to this Section 3 (see form of bond described in the petition, Record, p. 1). The finding of the court is as follows (Finding IV., Record, p. 96, near bottom of page):

"That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings."

[Findings of Fact, No. VI., Record, p. 98.]

"SEC. 2. Upon the application of said railroad company to the said Treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said County, it shall be the duty of said Treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the President and Secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as each five miles of said railroad shall have been graded, laid with ties and iron, said Treasurer shall upon proof thereof, which proof shall be the certificate of the County Surveyor to that effect, exchange with the said President and Secretary of said railroad com-

"That afterwards, to wit, on or about August 13, 1886, the treasurer of the said county of Pima upon proof of the fact that five miles of said railroad mentioned in the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad,' had been graded, laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the said president and with the said secretary of the said Arizona Narrow Gauge Railroad Company $50,000 of said bonds of the said county of Pima, for $50,000 of the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said bonds of the county of Pima being numbers 51 to 100 inclusive, and being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter

pany fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company."

of fact that at the time the said $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least five miles of the said Arizona Narrow Gauge railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883."

[Findings of Fact, No. VII., Record, p. 98.]

"That afterwards, to wit, on or about August 13, 1886, the treasurer of the county of Pima upon proof of the fact that a second and additional five miles of the said Arizona Narrow Gauge railroad had been graded and laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the president and secretary of the said Arizona Narrow Gauge Railroad Company $50,000 bonds of the county of Pima, numbers 101 to 150 inclusive, for $50,000 of the first mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said $50,000 bonds of the county of Pima being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said third $50,000 of

said Pima County bonds were thus delivered by the treasurer of said county, at least ten miles of the said Arizona Narrow Gauge Railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883."

In Finding V. (Record, p. 97), the Supreme Court of the Territory says that "there is no evidence in the records of the Board of Supervisors or the office of the treasurer of said Pima county how the first $50,000 of bonds [numbers 1 to 50, inclusive] came into the possession of the Arizona Narrow Gauge Railroad Company." The Court, however, in Finding IV. (Record, pp. 95, 96), above quoted, found that all the bonds numbers 1 to 150, inclusive, were delivered to the treasurer of the county and his receipt taken therefor. This was exactly in accordance with section one of the act of February 21, 1883. It

then became the duty of the treasurer of the county, and of him alone, under the express provisions of said act of February 21, 1883, to deliver these $50,000 bonds to the Arizona Narrow Gauge Railroad Company in exchange for a like amount of first mortgage bonds of that company. This duty was one that devolved upon the treasurer alone, and one which might have been enforced by mandamus. The Board of Supervisors of the county had, under the act of February 21, 1883, nothing to do with the bonds after they were delivered to the treasurer, and no record was required to be made, either in the office of the supervisors or in the office of the treasurer, of the time when such exchange of bonds for first mortgage bonds of the railroad company was made, or of the fact of such delivery.

The records of the Board of Supervisors of the county, mentioned in the latter part of Finding IV., show that these $50,000 bonds of the county had been delivered to the Arizona Narrow Gauge Railroad Company on or prior to June 16, 1884. Finding XII. (Record, p. 109), also expressly states that the first mortgage bonds of the Arizona Narrow Gauge Railroad Company, amounting to $150,000, were in all respects "made, issued and *delivered* in full conformity to all the provisions of the said act of the Legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad.'" One provision of the said act was that they should be delivered in exchange for a like amount of bonds of the county.

It matters not, there-

fore, that there is nothing in the *records* of the Board of Supervisors or office of the treasurer of Pima county to show how or when the first $50,000 bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That company was entitled, under the act of February 21, 1883, to have these bonds on the delivery of a like amount of first mortgage bonds of the company, and there is a finding that such first mortgage bonds were delivered in accordance with the act of February 21, 1883.

"SEC. 5. The bonds of said railroad company, hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including, also, all franchises and priv-

[Findings of Fact, No. XII., Record, p. 109.]

"That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at

ileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima. And said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company."

the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled 'An act to promote the construction of a certain railroad.'"

Opinion of Supreme Court of Territory on this Point.

After reviewing the foreging findings of fact and all the other findings of fact in relation to the original issue of these bonds, and the relation of Coler and Company to the construction of the railroad, the Supreme Court of the Territory unanimously found that the bonds of Pima County were issued and exchanged in good faith, in compliance with the terms of the act of February 21, 1883, and that they were bonds of the class which the act of Congress of June 6, 1896, required the Territorial Loan Commissioners to refund. Great complaint is made in the argument on the other side that the charter of the Arizona Narrow Gauge Railroad Company contemplated the building of a road some two hundred miles in length, and that funds were not provided by the contractors to build all of such mileage. As an answer to this complaint, as well as to show the views of the Supreme Court of Arizona on the subject of compliance with the Territorial act of February 21, 1883, and the act of Congress of June 6, 1896, we quote the following from the opinion of the Supreme Court of Arizona (Record, pp. 88, 89):

"Do these facts show the bonds in question are included among those required by the act of Congress of June 6, 1896, to be funded? It must be conceded that the county of Pima derived little or no benefit from the building of the few miles of the Arizona Narrow Gauge railroad; however, there can be no question under the proof, that the terms of the act of February 21, 1883, were fully complied with, both on the part of the county, and, as well, on the part of the railroad company, in the matter of the insurance and exchange of the bonds to the extent that the legislative act specifically pro-

vided. There was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company, or its contractor, Walker, and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done and did not have the resources to go on and complete the work. Can the Court say that notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the County of Pima thereby received no benefit from the same? The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds, to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the territorial act of February 21, 1883; and as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial but a literal compliance as well with the requirements of the act under which they were issued.

"We are forced to the conclusion, therefore, that no facts have been shown under the amended return which would warrant us in holding that the bonds in question were excluded from the provisions of the act of June 6, 1896, but, on the contrary, find that it is our plain duty under the decision of the Supreme Court construing said congressional act, and mandatory upon us, to issue the writ of mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890."

III.

This proceeding was begun against the Board of Loan Commissioners of the Territory of Arizona. The fact that the officers, to wit, the Governor, Auditor and Secretary of the Territory, who were Loan Commissioners at the time the suit was begun have ceased to be such officers, and that a new Governor, Auditor and Secretary, have been appointed, who, (as the finding expressly provides), because, by virtue of their being Governor, Auditor and Secretary, the Loan Commissioners of the Territory, does not affect the proceeding. The opinion of the Court below on this point is correct (Record, pp. 81, 82).

Speaking with reference to the writ of mandamus the Supreme Court of the United States, in the case of *Thompson vs. United States*, 103 U. S., 480, says (p. 483):

"The proceedings may be commenced with one set of officers and terminated with another, the latter being bound by the judgment," citing cases.

Also (p. 484):

"The duty is perpetual upon the present commissioners and their successors, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally," citing a New York case (s. c. more fully, *infra*, p. 71).

See also,

Dillon on Municipal Corporations, 4th Ed. Sec. 861*b*, and cases cited in the notes.

Leavenworth County Commissioners vs. Sellew, 99 U. S., 624.

The distinction between the case of United States vs. Boutwell, 17 Wall., 604, on the one hand, and the cases of Thompson vs. United States, 103 U. S., 480, and Commissioners vs. Sellew, 99 U. S., 624, on the other hand, is clear and well defined, and the present case is not like the Boutwell case, but is like the latter cases above mentioned.

This distinction has been pointed out by the Supreme Court of the United States in several decisions. In the *Boutwell case* the delinquency in question was that of a single officer—namely, the Secretary of the Treasury—and the delinquency was personal. Whereas in the present case the delinquency is that of the *Board of Loan Commissioners*, which is **a continuing board, with a continuing duty,** although some of the officers may change, and **the delinquency is that of the board** in its failure to

issue the bonds of the territory of Arizona. The Act of Congress creating the Loan Commission (Section 1 of the Act of Congress approved June 25, 1890, 26 U. S. Stat., 175) provides:

"For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said Territory, together with the Territorial Auditor and Territorial Secretary *and their successors in office* shall constitute a *board* of commissioners, to be styled *the loan commissioners* of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

All through the act the term used is "loan commissioners" or "board of loan commissioners."

The Revised Statutes of Arizona, 1887, Title *Mandamus*, Section 2335, provides as follows:

"The writ of *mandamus* may be issued by the Supreme or District Court to any inferior tribunal, corporation, *board* or person to compel the performance of an act which the law especially enjoins," &c.

Although certain persons were unnecessarily named as Loan Commissioners, yet this suit has been carried on all the way through as a suit against the Loan Commissioners, and not against any one as an individual. The present case is, therefore, fully and strictly within the decisions of the Supreme Court of the United States, where they say, for example, in *Commissioners vs. Sellew*, *supra* (p. 626):

"That principle [namely, the principle in the *Boutwell case*] does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was 'aimed exclusively against him *as a person*.' Here the writ is sent *against the board of county commissioners*,

a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone."

Precisely the same thing is true in the present case as was true in *Commissioners vs. Sellew, supra*, namely, the Territorial Governor, Territorial Auditor and Territorial Secretary "*and their successors in office*" were constituted a Loan Commission for the express purpose of funding the indebtedness of the Territory and of the counties and municipalities therein. *This board is a continuing body without regard to its individual members.* The object of creating the Governor, Auditor and Secretary *and their successors in office*, the Board of Loan Commissioners, was that the board should be a continuing body by such succession, and should not cease to exist by any change in office. The principle applicable is precisely the same as if the said board had been expressly created a corporation. It is by the Act of Congress made in substance and in fact a board with corporate succession like any corporation. In the *Sellew case* the alternative writ was addressed to the board in its corporate capacity, and to the individual members by name. So here the petition for the writ of mandamus, which corresponds to the alternative writ, was brought against the Board of Loan Commissioners, mentioning also, however, the individual members by name. In the *Sellew case* the peremptory writ was directed against the corporation alone, and the Supreme Court of the United States said that any person who happened to be a member of the board at the time such

peremptory writ was issued should be compelled to obey it. So here the peremptory writ of mandamus may be ordered against the Board of Loan Commissioners of the Territory of Arizona, and any person who happens to be a member of the board at that time can be compelled to obey it.

It may be urged that in the *Sellew case* the Board of County Commissioners was a corporation, while here the Board of Loan Commissioners is not by the statute expressly made a corporation. Two answers to any such objection may be made, namely: (1) The Board of Loan Commissioners are impliedly constituted a corporation, or at least the board is composed of *members who are such by succession*, which, for all the purposes of this case, is precisely the same as any other corporate succession; and (2) that whether or not the Board of Loan Commissioners was expressly made a corporation is immaterial.

In the case of *Thompson vs. United States*, 103 U. S., 480, the officer against whom the mandamus was sought was a clerk of a township. He was not a corporation. Thompson, the township clerk, set up that he was not the clerk against whom the mandamus proceedings were originally brought, but that such clerk had resigned his office. The Supreme Court of the United States held that this was not a sufficient answer. The Court says (p. 483):

"But we cannot accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant where, as in this case, *there is a continuing duty irrespective of the incumbent*, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. * * * **The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment.**"

The Supreme Court of the United States cited (p. 484) the case of *People vs. Collins*, 19 Wend., 56, where Mr. Justice COWEN said:

"The duty is perpetual upon the present commissioners and their successors, and the peremptory writ may be directed to and enforced upon the commissioners of the town generally."

In *Warner Valley Stock Company vs. Smith*, 165 U. S., 28, Mr. Justice GRAY, giving the opinion of the Court, says (p. 32):

"The case of a public officer of the United States differs in this respect from that of *a municipal board*, which is *a continuing corporation* (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed."

In the present case we have such a municipal board —namely, the Board of Loan Commissioners, which is a continuing body, although its individual members may be changed.

So, also, the Supreme Court in *United States vs. Butterworth*, 169 U. S., 600, says (p. 603):

"In *Thompson vs. United States*, 103 U. S., 480, the distinction is pointed out between proceedings where the obligation sought to be enforced devolves upon a corporation *or continuing body* and those where the duty is personal with the officer. *In the former case there is no abatement.* The duty is perpetual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie."

Within the rule above stated by the Supreme Court of the United States, *the duty which devolved upon the Board of Loan Commisioners was a continuing duty of a continuing body or board.* It was not a personal duty of a single officer. The act of Congress made it the

duty of the Loan Commissioners, acting on behalf of the Territory, a municipal subdivision of the United States, to issue its funding bonds, the same as in the cases of *Thompson vs. United States*, 103 U. S., 460, and *Commissioner vs. Sellew*, 99 U. S., 624, the statutes of the States of Michigan and Kansas made it the duty of the Clerk of the Township and the Board of County Commissioners of the county, respectively, to act on behalf of the municipal subdivisions of those states. *The Territory continues and the Board of Loan Commissioners continues*, and the Act of Congress has made it *the continuing duty* of the Governor, Secretary and Auditor of the Territory of Arizona *and their successors in office*, acting as a board, to issue the funding bonds in question on behalf of the Territory. The essential things are that this *is a continuing duty devolved upon a continuing board to issue the bonds of a continuing corporation, namely, the Territory of Arizona.*

What the petitioners in the present case have sought is to compel the issuance of the corporate bonds of the Territory of Arizona, which bonds the Territory is required by the Act of Congress to issue. This, under the Act of Congress, is a duty which devolves upon the Territory, irrespective of any individual who happens at any time to be a member of the Board of Loan Commissioners. It is a continuing duty upon the part of the Territory of Arizona to be enforced by the action of the Board of Loan Commissioners, which is a continuing body. In this respect this case is like the case of *Commissioners vs. Sellew, supra*, where the plaintiff had a judgment against the County of Leavenworth recovered on some negotiable county bonds, and was seeking to enforce the corporate

obligation of the County of Leavenworth, and to act by mandamus upon the Board of County Commissioners. So in the case of *Thompson vs. United States*, *supra*, the plaintiff was seeking to enforce against the township its corporate obligation to pay a judgment recovered in favor of the plaintiff, and was seeking a mandamus to enforce that obligation. In all of these cases that which is sought to be enforced and the act which is sought to be done is a continuing one, irrespective of the incumbency of any particular person in office.

In the *case of Boutwell* the Court had under consideration an application for a mandamus against a Cabinet officer of the United States—a high executive officer, who really represents the President and is a part of his official family. It is obvious that the question of issuing a mandamus against a *Cabinet officer* to enforce a *personal* duty is a different thing from the question of issuing one against the *Board* of Loan Commissioners of the Territory of Arizona to enforce a duty imposed *upon them and their successors* by Acts of Congress.

The Supreme Court of the United States, on the former appeal, expressly recognized this suit as against the Board of Loan Commissioners—not against the individuals. The names of the individuals Franklin and others were not mentioned in the entire opinion.

The Court begins its statement of the case by saying (*Utter vs. Franklin*, 172 U. S., 416, p. 416):

"This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, *acting as loan commissioners*, to issue certain bonds in exchange for bonds issued by the county of Pima," &c.

The Court further says (p. 417): "Whether the *loan commissioners of the Territory* can be required to refund these obligations." And the opinion concludes (p. 425): "We are, therefore, of opinion that it was made the duty of the *loan commissioners* by these acts to fund the bonds in question."

This case, therefore, clearly falls within the doctrine of *Commissioners vs. Sellew*, 99 U. S., 624, and *Thompson vs. United States*, 103 U. S., 480, and is not at all like the case of *United States vs. Boutwell*, 17 Wall., 604.

Furthermore, even if the fact that the special proceeding is not affected by some or all of the members of the Board of Loan Commissioners going out of office and others coming in during the pendency of this proceeding was or could have been at any time open to question, it is no longer open to question owing to the decision of the Supreme Court of the United States in this matter.

The Supreme Court of the United States has rendered its decision and judgment against the Loan Commissioners of the Territory of Arizona. It would not have done so had the action abated, and its rendering the judgment is a decision that the action did not abate either by the changes in the membership of the Board of Loan Commissioners or otherwise. The

persons who were such officers at the time of the decision by the Supreme Court of the United States, were different from those who were such officers when the action was begun. The Supreme Court of the United States, when the action was before it, was bound to take and did take judicial notice of who were the Governor and Secretary and Auditor of the Territory of Arizona. This is under the well-known principle stated in *Greenleaf on Evidence* as follows (13th Ed., Vol. I., Sec. 6):

"They [courts] will also judicially recognize the political constitution or frame of their own government, *its essential political agents or public officers;* sharing in its regular administration, and its essential and regular political operations, powers and action. Thus, notice is taken by all tribunals of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges; the genuineness of his signature; the heads of departments *and principal officers of state,* and the public seals; the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister, marshals and sheriffs. * * * The judges of the Supreme Court of the United States are, on this account, bound to take judicial notice of the laws and jurisprudence of all the States and Territories."

The learned counsel for the defendants on their brief (below) admitted this principle of judicial notice.

The action, therefore, of the Supreme Court of the United States in rendering their judgment in this cause against the Loan Commissioners of the Territory is conclusive in the matter that the action has not, in any wise, been affected by the mere change in the membership of the Board of Loan Commissioners.

Change of officers immaterial.—Appellants were made parties.

But this question raised by the defendants, that the persons who were loan commissioner, at the time the suit was begun have ceased to be such loan commissioners is really immaterial. These present loan commissioners appeared in this case after it went back to the Supreme Court of the Territory, their counsel took part in the arguments before the court and in the conduct of the case, and in its submission to the court (Record, p. 113), **and they thus being in court this judgment was entered against them, directing that a writ of mandamus be issued against them, the present defendants, requiring them to fund the bonds in question. This being so, any suggestion that the personnel of the loan commissioners has changed is wholly immaterial.**

The kindred suggestion (defendant's assignment of error, Record, p. 115) **that the judgment now under appeal is erroneous because "N. O. Murphy, C. H. Akers and J. W. Vickers, who are now the governor, secretary and auditor of the Territory of Arizona, were never made parties to this proceeding," is founded in a misconception of fact as well as of law.**

It is not true that the said officers named were never made parties to this proceeding. On the contrary, they, and no other officers, have been in court,

and they and their attorneys have been in court and have taken every proceeding which has been taken on behalf of the defendants from the time that the mandate of this court went down until and including the final judgment from which this appeal is taken, and including, also, the taking of the present appeal. They and their attorneys filed the so-called "amended return" on June 1, 1899, setting up alleged new defenses (Record, pp. 8–21). They filed various motions appearing in the record, and, among others, on March 29, 1900, the motion (Record, p. 69) to dismiss the cause on the ground that the original officers "prior to the filing of this motion, ceased to be officers of the Territory of Arizona and of the loan commission of the said Territory, by reason of their terms of office having expired, of all which this court takes judicial notice. And that the present officers of the Territory of Arizona are N. O. Murphy, governor; Charles H. Akers, secretary, and George W. Vickers, auditor. (Signed) C. F. Ainsworth, Attorney-General." They also filed various affidavits for continuance (Record, pp. 70–78), made stipulations as to the evidence (Record, p. 79); in short, they appeared and defended the case, taking testimony, appearing before the referee, making requests to the court to find the facts and appearing in every stage of the case and resisting and opposing the judgment sought by the petitioners.

That they did appear and were parties to the record and to the cause appears conclusively in the judgment entered in the Supreme Court of the Territory (Record, p. 113), which, after entitling the case, proceeds:

"This cause coming on further to be heard, and the plaintiffs and petitioners appearing by William H.

Barnes, their attorney, and the Loan Commissioners of the Territory of Arizona, to wit: N. O. Murphy, governor; George W. Vickers, auditor, and Charles H. Akers, secretary, appearing by Charles F. Ainsworth, attorney-general, and the said cause having been argued by the respective counsel for the petitioners and defendants, and submitted to the court upon the petition for writ of mandamus filed herein on or about the 31st day of December, 1896," etc., etc., "it is * * * further considered, ordered and adjudged that a peremptory writ of mandamus do issue, directed to N. O. Murphy, governor; George W. Vickers, auditor, and Charles H. Akers, secretary, the present loan commissioners of the Territory of Arizona, being successors in office to respondents Franklin, Leitch and Bruce, and their successors in office as such loan commissioners, commanding them, upon the tender by the plaintiffs of the $150,000.00 of bonds of the county of Pima," etc., etc.

This judgment, therefore, establishes conclusively that the present loan commissioners formally appeared in the cause as the loan commissioners, and were represented by the Attorney-General, their official legal adviser and attorney.

The assignment of error, that Murphy, Akers and Vickers were never made parties to this proceeding is not true in point of fact, and if any formal order making them such were necessary, such order has been made.

In point of law, however, as above shown, even if they had not appeared, and had not thus been made parties to the record as loan commissioners, they would be bound (as the authorities above cited fully show) as the official successors of their predecessors who were in office as loan commissioners when the proceeding was begun.

IV.

The statute passed at the session of 1899 by the Legislature of the Territory of Arizona, repealing or attempting to repeal Section 1 of the old Territorial Funding Act of 1887 and Section 1 of the Act of the Territory of Arizona of March 19, 1891, has no effect whatever upon the rights of the relators or upon the proceedings in this cause.

The following is a copy of the Act of 1899:

No. 32.

AN ACT

To Abolish the Loan Commission and to Repeal Sundry Laws Relating Thereto.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECT. 1. That Paragraph 2039, Sect. 1, Chapter one, Title 31, of the Revised Statutes of the Territory of Arizona; also, that Sect. 1 of Act No. 79,* Session Laws of the Sixteenth Legislative Assembly of the Territory of Arizona; also, Act No. 33† and Act No. 74,† Session Laws of the Eighteenth Legislative Assembly of the Territory of Arizona, are hereby repealed.

---

* This is Act March 19, 1891, for text of which act see our brief in *Utter vs. Franklin*, p. 85, reprinted and filed herewith.

† These two acts have no bearing upon *Utter case*. No. 33 relates only to *territorial* indebtedness incurred December 31, 1890, to December 31, 1895, and refunding thereof as provided in Act of Congress August 3, 1894, and approves Act of Congress August 3, 1894. No. 74 is merely "An Act to remedy defects in the records of the loan commissioners of the Territory of Arizona," as its title indicates.

SECT. 2. This Act shall take effect and be in force from and after its passage.

HENRY F. ASHURST,
Speaker of the House.

MORRIS GOLDWATER,
President of the Council.

Governor.

This bill having been returned by the Governor with his objections thereto, and, after reconsideration, having passed both houses by a two-thirds vote of each house, has become a law this 13th day of March, A. D. 1899.

HENRY F. ASHURST,
Speaker of the House.

MORRIS GOLDWATER,
President of the Council.

After the foregoing act was passed by the Legislative Assembly of Arizona, and when it was presented to the Governor of the Territory, N. O. MURPHY (one of the defendants), for his approval, he submitted it to Hon. CHARLES F. AINSWORTH, the Attorney-General of the Territory, for his opinion, and the Attorney-General rendered an opinion advising the Governor that the act was void so far as attempting to abolish the Loan Commission of the Territory was concerned. Accordingly, the Governor sent to the Legislative Assembly a message refusing his approval of the act, and accompanied his message with the opinion of the Attorney-General This message of the Governor and the opinion of the Attorney-General are as follows :

Veto message of Governor N. O. Murphy (one of the defendants), on the ground that the Territorial Legislature had no power to abolish Loan Commission.

HIS REASONS FOR NOT SIGNING BILL ABOLISHING FUNDING COMMISSION.

The following is the text of the governor's veto of the loan commission bill which was sent to the council on Saturday:

"TO THE HONORABLE, THE COUNCIL OF THE TWENTIETH LEGISLATIVE ASSEMBLY OF ARIZONA:

"I have the honor to return without my approval council bill No. 38, for the following reasons:

"If signed, it would be entirely nugatory and inoperative, as is clearly set forth in the opinion of the attorney-general herewith, which is made a part of this message, and to which your attention is respectfully invited; and, while the terms of the bill do not so specify, it is presumed that its purpose is to prevent the performance of official duties under existing law which may conflict with public interests and policy.

"The questions involved are purely legal, which can only be reached through the courts and congress. The legislature of the territory has clearly no jurisdiction over, nor power to settle them. Whether or not the legislation which created and has continued the loan commission has been wise and beneficial, are questions of policy, and not of law, and are not pertinent in this connection; and the same is true as to the manner in which the law has been or may be executed. It is the law itself only with which you have now to deal. If unfortunate and unjust burdens have been imposed upon the people in the past because of the operation of the existing funding law, or if it is feared that the law will work hardship in the future, the proper recourse is with congress to repeal unjust statutes, and with the courts to control the manner of their execution, and, if necessary, enforce or restrict them by mandate or injunction.

" It may have been unwise to fund certain indebtedness heretofore, and it may be unwise and undesirable to fund any further indebtedness ; yet a procedure that is nugatory can in no wise relieve the situation, and it is not improper to say that the act of funding obligations does not make them legal, nor validate them in any way. A converted security is just as much a proper subject for legal attack after as before conversion. The material question here involved is, whether or not the legislature has power to abolish the loan commission and repeal certain laws. In my judgment, it is clearly evident that no such power exists, and that the only proper way to accomplish such a result is through congress ; and the only proper way to reach invalid securities is through the courts.

" A careful reading of the report of the attorney-general is requested.

" (Signed) N. O. MURPHY,
" Governor."

Opinion of Attorney-General Ainsworth, as legal adviser of the Governor, to the effect that the Territorial Legislature had no power to abolish the Loan Commission.

" OFFICE OF THE ATTORNEY-GENERAL,
PHŒNIX, ARIZONA, March 10, 1899.

" HON. N. O. MURPHY,
Governor of the Territory of Arizona,
Phœnix, Ariz. :

" SIR—Replying to your favor of March 9, in which you request my official opinion upon council bill No. 38 of the Twentieth legislative assembly, entitled ' An Act to Abolish the Loan Commission and to Repeal Sundry Laws Relating Thereto,' also as to the legal points involved in connection with the different congressional acts on the subject, and whether or not such a law would be operative and could be enforced ; also as to its probable effect, beg to report that in my opinion this act if it should become a law would only have the effect to repeal section one of act No. 79 of

the session laws of the Sixteenth legislative assembly. [That is, the Territoral Act approved March 19, 1891, reprinted in our Brief in *Utter vs. Franklin*, pp. 85–89).

So far as council bill No. 38 attempts to repeal paragraph 2039, section 1, chapter 1, title 31 of the revised statutes of Arizona, 1887, the act would be nugatory, as there is no such section to repeal. Congress, by act approved June 25, 1890, amended title 31, revised statutes of 1887, known as the finding act, and as amended it approved and confirmed it subject to future territorial legislation, and repealed all acts in conflict with the provisions of the act as amended. If, on the other hand, it is the purpose or intention that council bill No. 38 repeals this act as approved and confirmed by congress, then it is clearly beyond the province of the territorial legislature to do so.

It will be observed upon reading the act of congress of June 25, 1890, that among other things it provides that the existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses for carrying on territorial, county, municipal and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof; and that thereafter no warrants, certificates or other evidences of indebtedness shall be allowed and issued or be legal where the same is in excess of the limit prescribed by the Harrison act. If, under the provision in the act of congress aforesaid, being section 15 thereof, as by congress amended and confirmed subject to future territorial legislation, it was intended by congress to authorize the territory to legislate upon this particular act, then it is clear that the territorial legislature could, irrespective of congress, from time to time extend the limit as to what indebtedness funding bonds could be issued, and in place of having that time expire on the 31st of December, 1890, as prescribed by the act of June 25, 1890, the territorial legislature could provide that it should not expire until 1900.

If, therefore, the territorial legislature has power to amend or abolish section one of this act of congress, they have the equal right to abolish or amend any other section, including section 15 above quoted. It has never been claimed or contended by any territorial legislature of this territory, that they had any such right; on the contrary, when they have desired the time extended or this act of congress amended,

they have applied directly to congress for such extension or amendment. **What congress meant, in my opinion, by the expression in the act of June 25, 1890, "subject to future territorial legislation," is, that the territorial legislature could pass other and further laws on this subject as the territory might require, not in conflict with the provisions of that act, and this conclusion is the natural deduction from the subsequent acts of both congress and the territorial legislature upon this subject, for they have both treated this act of June 25, 1890, as exclusively under the control of congress and not subject to modification by territorial legislation.**

Congress by an act approved July 13, 1892, amended this act of June 25, 1890, by providing that the interest on the bonds should be payable semi-annually on the 15th of January and July in each year. Again, on August 3, 1894, congress amended this act of June 25, 1890, by providing that the present outstanding warrants, certificates and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the year ending December 31, 1894, and December 31, 1895, might also be funded and bonds issued for the redemption thereof, and thereafter; no warrants, certificates or other evidence of indebtedness should be allowed to issue or be legal where the same are in excess of the limit prescribed by the Harrison act.

And, again, on June 6, 1896, congress amended this act of June 25, 1890, also the act of congress amending the same, approved August 3, 1894, by authorizing the funding of all outstanding obligations of said territory and the counties, municipalities and school districts thereof, as provided in the act of congress approved June 25, 1890, until January 1, 1897. In this act of June 6, 1896, the following language is used: "An act amending and extending the provisions of an act of congress entitled 'An Act Approving With Amendments, the Funding Act of Arizona, Approved June 25, 1890, and the Act Amendatory Thereof and Supplemental Thereto, Approved August 3, 1894,'" thus conclusively showing that congress itself in dealing with

this subject treated the act of June 25, 1890, as an act of congress and not as an act of the territorial legislature, and in all its amendments to the act of June 25, 1890, it has treated the act as though the territorial legislature had no power or control whatever over the act.

The conclusion is irresistible that the territorial legislature has no more power or authority over the act of June 25, 1890, as passed by congress, than they have over the organic law of the territory. Both the organic law and the act of June 25, 1890, emanate from the same fountain head, viz.: congress. All the laws of the territorial legislature must be subordinate and not in conflict therewith.

I am, therefore, clearly of the opinion that should you approve this act, nevertheless, it would be void so far as it attempts to abolish the loan commission of the territory, by endeavoring to repeal paragraph 2039, section 1, chapter 1, title 31, revised statutes of Arizona as amended, approved and confirmed by act of congress of June 25, 1890.

Respectfully submitted,

CHARLES F. AINSWORTH,
Attorney-General.

Opinion of the Supreme Court of the Territory of Arizona in this case to the same effect, all the four judges of that court unamiously holding that the Territorial Legislature had no power to abolish the Loan Commission.

The Supreme Court of the Territory of Arizona also unanimously came to the same conclusion—to wit, that the said repealing act of 1899 had no effect whatever upon the proceedings in this cause. We quote from the opinion of that court as follows (Record, pp. 82–84):

"The question as to whether the loan commission has been abolished is one which involves a considera-

tion of not only the repealing statute, but, as well, the various acts, congressional and territorial, relating to the creation of the commission, its duties and the general subject of funding. In the Revised Statutes of 1887 there was incorporated, as 'Title XXXI.,' an act which provided for the creation of a commission to be known as the loan commissioners, and the funding by this commission of the outstanding and existing indebtedness of the Territory. This commission was to be composed of the governor, auditor and secretary of the Territory. Congress, by the act of June 25, 1890, amended the territorial act in important particulars, and then 'approved and confirmed' the same, 'subject to future territorial legislation.' The territorial legislature, construing the clause 'subject to future territorial legislation' to mean that Congress, having taken up the territorial act of 1887 and amended it before making it binding and operative upon the Territory, chose to confer upon the latter the privilege of consenting to or disapproving of its provisions by its act of March 19, 1891, supplemented the congressional act by additional provisions intended to more perfectly carry out its provisions, and in the first section declared that the latter act should 'be, and the same is hereby, now re-enacted as of the date of its approval.'"

The language used in the territorial act indicates that the territorial legislature intended to approve of the congressional act and accept its provisions, under the permission granted and expressed in the clause, "subject to future territorial legislation." Whether this construction was primarily right or not, it has been subsequently followed by the Legislative Assembly of the Territory, and acquiesced in by Congress. Congress by the act of August 3, 1894, amended section 15 of the act of June 25, 1890, by extending its provisions so as to permit the funding of additional indebtedness. When the next legislature convened after the passage of the congressional act just mentioned, construing, as it did its predecessors, the clause, "subject to future territorial legislation" to mean that the congressional act should only become operative when accepted by the Territory through its General Assembly, by act approved March 19, 1895, ratified and confirmed the objects, purposes and provisions of the congressional act. In the congressional act of August 3d, 1894, a d in the curative act of congress of

June 6, 1896, the act of Congress of June 25, 1890, is referred to, and no mention is made of a re-enactment of the same by the territorial legislature, which is significant as indicating that Congress recognized the act of June 25, 1890, as having become operative, and as continuing in force, and as constituting the existing law upon the subject of funding. Congress having full authority to legislate directly for the territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the territory, such legislation has the force and effect of a constitutional provision, and becomes a part of the organic law. Had the clause, "subject to future territorial legislation" not appeared in the act of June 25, 1890, unquestionably the act would have become immediately operative without the consent or acquiescence of the Territory, and no subsequent legislation by the territorial legislature would have been needed to give it effect, or could in any way affect its provisions. In the light of the contemporaneous construction placed upon the clause "subject to future territorial legislation" by the legislature of the Territory, and in view of the fact that Congress thereafter invariably referred in subsequent legislation to the act of Congress of June 25th, 1890, and made no mention of any re-enactment of the same by the Territory, and considering the relation which the Territory sustains to Congress, we are led to the conclusion that the act of June 25, 1890, is now to be construed as having been accepted in accordance with the permission granted to accept or refuse the same, and, having been accepted, is now the paramount law upon the subject of funding and become a part of the organic law, to the extent, at any rate, that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress.

The repealing statute which we have referred to, being act No. 32 of the laws of 1899, reads as follows: "That paragraph 2039, section 1, chapter I., title XXXI., of the Revised Statutes of the Territory of Arizona; also that Section 1 of act No. 79, session laws of the 16th Legislative Assembly of the Territory of Arizona; also act No. 32 and act No. 74, Session Laws of the 18th Legislative Assembly of the Territory of Arizona,

are hereby repealed." Paragraph 2039 referred to in this act, was reincorporated as the first section of the Congressional Act of June 25, 1890, and reads as follows: "For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and the territorial secretary, and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the power and perform the duties hereinafter provided." Act No. 79 referred to, is the act of March 19, 1891. Acts No. 33 and acts No. 74, sought to be repealed by the act, do not pertain to the creation of the board of loan commissioners, and their consideration is not important in this connection.

The Act of Congress of June 25, 1890, covered the whole field of the previous territorial legislation upon the subject of funding, and included such new legislation as to clearly indicate the intent that it should take the place of the Territorial Act of 1887. When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, and embraces new provisions, plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act.

U. S. vs. Tynin, 11 Wall., 88.

The act of Congress being revisory in its terms, embracing new provisions and covering the whole subject of funding, supplemented and thereby repealed the territorial statute of 1887.

As repeals by implication are not favored, the repeal of the first section of the statute of 1887 can therefore have no effect to repeal the similar provision of the act of June 25, 1890.

Again, by the attempted repeal of the first section of the act of March 19, 1891, which, as we have seen, provided in terms "that the act of Congress entitled, 'An act approving, with amendments, the funding Act of Arizona approved June 25, 1890,' be, and the same is hereby, now re-enacted as of the date of its approval", the intent of the legislation is uncertain in that it is not made evident whether the repeal of said section is to be construed as an attempt to repeal the

whole, or only a part of the congressional act, if it can possibly be construed as tending to either result. It can hardly be construed as an attempt to repeal the whole of the act of June 25, 1890, inasmuch as the other section of the act of March 19th, 1891, were excepted from the repealing act, and these were supplemental to the congressional act. If the repealing of section 1 of the law of 1891 be construed as a repeal of only a part of the act of June 25, 1890, how then can the court give it effect by declaring what portion of said act it was designed and intended to affect? Irrespective, therefore, of the question of the power of the territorial legislature to repeal the congressional act creating the loan commission, it is more than doubtful if the act of 1899 can be construed so as to effect that result."

In support of and in addition to the reasons given by Attorney-General AINSWORTH, and by the Supreme Court of the Territory, there are several reasons why this act of 1899 has no effect upon the proceedings then pending for the issue of funding bonds of the Territory.

There can be no doubt of the soundness of the views of the Governor of the Territory, N. O. Murphy, the Attorney-General of the Territory, Charles F. Ainsworth, and the four justices of the Territory, above quoted, that the funding act of Congress approved June 25, 1890, is an act of Congress, and is to be so regarded, and is not to be regarded as an act of the Territory subject to repeal by the Territorial legislature.

When Congress took up this matter of funding indebtedness in the Territory of Arizona, it went over the whole situation. There had previously existed the funding act of the Territory of March 10, 1887, which authorized the funding of Territorial indebtedness only. In the act of June 25, 1890, Congress provided for the funding of county, municipal and

school district indebtedness. Congress, also, in going over the whole subject, made many new provisions as to funding indebtedness.

We print in the appendix to this brief a copy of the act of June 25, 1890, showing in italics the new provisions made by Congress in this act, also showing in brackets certain provisions made by the Territory in its act of March 10, 1887, which Congress did not adopt. This act of June 25, 1890, therefore, is emphatically an act of Congress, dealing with all phases of the subject of funding.

Furthermore, Congress ever after this, whenever it referred to funding of indebtedness by the Territory of Arizona, referred only to its own act, and never to any Territorial acts. Thus, for example, in the act approved July 13, 1892 (reprinted in brief in *Utter vs. Franklin*, p. 89), Congress amends, not any Territorial act, but amends its own act of June 25, 1890. So, also, in the act of Congress approved August 3, 1894 (reprinted in brief in *Utter vs. Franklin*, p. 90), Congress there amends section fifteen of its own act approved June 25, 1890. So, also, in the act of Congress approved June 6, 1896, which validated these bonds and directed them to be funded, the title is "An Act amending and extending the provisions of *an act of Congress*, entitled" etc., "approved June 25, 1890."

All this shows that in the said act of June 25, 1890, Congress dealt at length and in detail with the whole subject of the funding indebtedness of the Territory of Arizona and its municipalities, and, therefore, by various amendments, referred to this act of June 25, 1890, as an act of Congress—its own act—and gave not the least evidence in any shape or manner whatever

that it regarded the said act as anything other than the act of Congress.

The Governor and the Attorney-General and the Supreme Court of the Territory of Arizona were, therefore, clearly right in holding that this act of June 25, 1890, was an act of Congress, of which neither section one nor any other part thereof could be repealed by the Territorial Legislature.

(1) The said act of 1899 of the Territory does not repeal or undertake to repeal the Acts of Congress of June 25, 1890, and June 6, 1896, under which these bonds are to be funded.

The Supreme Court of the United States, in its decision in the present case, expressly states that the Act of June 6, 1896, provides that these bonds "*shall* be funded." It is perfectly plain and obvious that the Legislature of the Territory of Arizona cannot, in any way, repeal an Act of Congress. The said Act of the Legislature of the Territory does not repeal or undertake to repeal the said Act of Congress of June 25, 1890, or the Act of June 6, 1896, creating the Loan Commission, and providing for the issue of the funding bonds now in question.

Said repealing act does not and cannot, under any possible theory whatsoever, have any effect upon the act of Congress approved June 6, 1896, which validated these bonds, and provided that they should be funded "as provided in the act of Congress approved June 25, 1890."

History of the enactment of the act of Congress, approved June 6, 1896, showing that Congress itself dealt directly with the question of validating these bonds, and provided that they should be funded, and that the Legislature of the Territory of Arizona has no power or authority whatsoever to repeal, or in any way interfere with, these express provisions of the act of Congress of June 6, 1896.

We have printed in the summary at the beginning of this brief the titles and dates of the Acts of Congress and of the Territory of Arizona relating to the bonds in question in chronological order. It will aid in arriving at a correct understanding of the meaning and effect of the act of June 6, 1896,if we consider these acts chronologically.

February 21, 1883, the Territory passed an act entitled "An Act to promote the construction of a certain railroad." This is the act under which were issued the bonds in question in aid of the Arizona Narrow Gauge Railroad Company.

In 1894 these bonds were held invalid in the case of *Lewis vs. Pima County*, 155 U. S., 54, on the ground that they were not obligations of the county "necessary to the administration of its internal affairs" within the meaning of the act of Congress approved June 8, 1878. (See this act reprinted in brief in *Utter vs. Franklin*, p. 60.)

Under the rule announced by this Court in its decision in *Lewis vs. Pima County*, 155 U. S., 54, 1894, a large number of railroad-aid bonds, issued under authority of acts or territories, were illegal. We

refer to these acts and to the bonds issued thereunder in our brief in *Utter vs. Franklin*, and a list of some of the bonds is given in the report of Senator HARRISON, printed in the Appendix in our brief in *Utter vs. Franklin*, pp. 58, 59.

Under these circumstances the question arose as to what should be done with reference to these various railroad aid bonds which had been issued under the provisions of and in compliance with the acts of territorial legislatures, enacted when it was supposed that these territorial legislatures had a right to enact such statutes. Of course these obligations, issued and purchased in good faith, ought to be paid. Every right-minded man would so agree. Accordingly, the territorial Legislative Assembly of Arizona of 1895 adopted a Memorial to Congress asking for the enactment of some law which would validate such bonds. The text of this Memorial is printed in our brief in *Utter vs. Franklin*, pages 36, 37, as a quotation in the opinion of the Supreme Court of the Territory of Arizona in *Coconino County vs. Yavapai County*, which opinion held railroad aid indebtedness of Yavapai county valid and the funding bonds issued to fund the same valid. This case also was afterward affirmed by the Supreme Court of the United States on appeal, 176 U. S., 681. Said memorial of the Legislative Assembly of Arizona is quoted and referred to in the opinion of this court in this case on former appeal, *Utter vs. Franklin*, 172 U. S., 416.

In 1896 this memorial was before Congress, and Congress passed the act approved June 6, 1896, which validated these bonds, and directed that they be funded in accordance with the act of Congress approved June 25, 1890, as this court expressly held on

the former appeal in this case, *Utter vs. Franklin*, 172 U. S., 416.

This chronological history of the events and reasons which led to the passage of the act of Congress approved June 6, 1896, validating the bonds in question, and directing that they be funded, shows that Congress intended in said act of June 6, 1896, itself to deal with these very bonds, and Congress has itself enacted in said act that these bonds shall be funded as provided in the act of Congress approved June 25, 1890. It also further shows that whatever may be the policy and effect of the legislation with respect to funding indebtedness generally, Congress has in said act of June 6, 1896, dealt specifically with the particular indebtedness now in question, and has directed that *that* shall be funded. It was not contemplated by Congress that the Territory of Arizona should have the power to contravene this express provision of the said act of Congress of June 6, 1896. Congress did not leave it to the Legislature of the Territory of Arizona to say whether or not this Pima county indebtedness was validated and should be funded, but Congress itself said that it was validated and should be funded, and gave no power to the Legislature of the Territory to repeal this provision, or to deal with it in any way, shape or manner whatsoever. This provision of the act of June 6, 1896, stands to-day unrepealed and wholly incapable of repeal by the Legislature of Arizona.

It is necessary to keep in mind the relation of Congress to the territories and to the territorial legislatures. Congress is the superior body, responsible for the good government of the territories, and responsible that the territories and their counties shall be re-

quired to pay their obligations honestly incurred. Bear in mind also that Pima County, which has delegates in the Legislative Assembly of the Territory of Arizona, has a direct interest in repudiating its obligations, and might naturally have the sympathy of the delegates from other counties. Keeping all these things in mind, it is to be remembered that Congress dealt with the matter of these bonds directly and without committing the matter in any way whatsoever to the Legislative Assembly of the Territory. Under all these facts and circumstances it cannot be believed for a moment that Congress intended to commit, or did commit, to the Territory of Arizona the power to repeal the will of Congress expressed in this act of June 6, 1896, that these bonds should be validated and should be funded.

We repeat, therefore, that whatever may be the effect of the repealing act of the Territory of 1899 as respects funding of indebtedness generally, such act can have no possible effect whatever on the funding of this indebtedness which Congress, in the said act of June 6, 1896, expressly directed should be funded.

The territory, by its memorial, besought Congress to pass such act as that of June 6, 1896. Such an act was beyond the power of the territorial legislature to pass. Congress alone could act. By the passage of the act of June 6, 1896, Congress adopted its own policy in respect of such debts. That policy was that such debts should be validated and should be funded and Congress did not leave with or give to the territorial legislature of Arizona any power whatever to repeal or affect the act of June 6, 1896, or thwart or defeat the policy and purpose of Congress in its enactment.

Supposing, for the sake of argument, it were to be admitted that said repealing act of the Territory of 1899 had repealed section one of the act of Congress approved June 25, 1890 (which, however, we deny, as the Legislative Assembly of the Territory plainly cannot repeal an act of Congress, or any part thereof), still the Legislative Assembly of the Territory has not repealed, or even attempted to repeal, or even mentioned, the act of Congress approved June 6, 1896. (Full text of this Act, see Brief in *Utter Case*, filed herewith, pp. 30, 31.) That act provided (Sec. 1) that the bonds in question "shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest bearing bonds as provided by this act." "This act," that is, the act of June 6, 1896, expressly provides

"that the provisions of acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June 25, 1890."

In other words, the said act of Congress approved June 6, 1896, expressly provides that these very bonds shall be funded as provided in the "act of Congress approved June 25, 1890." This act of June 6, 1896, stands in full force and unrepealed. This act has not been and cannot be repealed by the Territorial legislature. It is clear, therefore, that even if it be supposed that the Legislative Assembly of the Territory of Arizona had the power to repeal, and did repeal, section one of the act of Congress approved June 25, 1890, generally, and so far as concerns indebtedness

not covered by the said act of Congress approved June 6, 1896, yet the Legislative Assembly of the Territory had no power whatever to repeal, and did not undertake or attempt to repeal, any of the provisions of the said act of Congress approved June 6, 1896. Therefore, even supposing that section one of the act of June 25, 1890, is repealed so far as concerns all other indebtedness, yet, said act, approved June 25, 1890, including section one thereof, as well as all other parts of the said act, was in full force and effect, *so far as respects the funding of the indebtedness provided in the act of June 6, 1896, to be funded.* This is the express provision of the act of Congress of June 6, 1896—namely, that these very bonds now in question shall be funded as provided in the act of Congress approved June 25, 1890. This express provision of the Act of June 6, 1896, the Legislative Assembly of the Territory did not attempt to repeal and could not repeal. We do not, in this case, need to say (although that is the correct view, and that is the view which was taken by the Attorney-General of the Territory, and by the Governor, and by the unanimous opinion of the four justices of the Supreme Court of the Territory) that section one of the act of Congress of June 25, 1890, was not repealed by the act of the Territory of 1899. All we need to say is that the act of June 6, 1896, was not repealed, and that the act of June 25, 1890, including section one thereof, is alive, and is, by force of the act of June 6, 1896, kept alive, *so far, at least, as funding the bonds authorized and expressly provided by the said act of Congress of June 6, 1896, to be funded as provided in the act of Congress approved June 25, 1890.*

Although a statute is repealed generally yet it may be in force for certain purposes. See to this effect *Siebert vs. Lewis*, 122 U. S., 284, in which this court held that a statute of Missouri which provided for the levying of taxes to pay interest on county bonds was in full force and effect as respects bonds issued thereunder, although it had been repealed by the legislature. On this point the court said, Mr. Justice MATTHEWS giving the opinion (p. 299):

"It [the opinion of the Supreme Court of the State of Missouri] also assumes for that reason, that those provisions of the Revised Statutes are the only laws in force for the collection of such a tax—those in force in 1871, when the judgment of the Circuit Court was rendered, having been repealed.

For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the sections of the Revised Statues in question impair the obligation of the contract with the relator under the act of March 23, 1868, and as to him are, therefore, null and void by force of the coustitution of the United States; and that *the laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose.*"

S. P. *Memphis vs. Brown*, 97 U. S., at p. 295 (bottom) and p. 296 (top), to which especial reference is made (see *infra*, p. 103, of this brief).

See, also, to the same effect, *Village of Champlain vs. McCrea*, 165 N. Y., 264 (quoted more fully, this brief, p. 107), where the court held that a water system act of 1875 was in force as to the village of Champlain, although it had been repealed by the general village law of 1897.

(2) Furthermore said repealing Act of 1899, passed after the decision of this court

on the former appeal in this case, had no effect in this case because the statutes of Arizona expressly provided that a repeal did not affect " any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken," &c.

Section 2934 of the Revised Statutes of Arizona provides as follows :

" 2934. (Sec. 7.) The repeal or abrogation of any statute law or rule does not revive any former statute law or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby."

It will be noticed that this section provides: " The repeal or abrogation of any statute law does not affect any right then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute."

Our " right " to have our bonds funded " existed " and had fully " accrued " at the date of the repeal and that right had been adjudged by this Court not only to " exist " but to be perfect and complete before the date of said repealing act of March 13, 1899. Therefore, even if this repealing act were valid, and did in fact repeal the sections of the statutes therein referred to, it would not affect our right to have the funding bonds issued; because (1) our right was within Section 2934 above quoted " a right then already existing or accrued at the time of

such repeal;" and (2) because the Utter case was "an action or proceeding theretofore taken," and actually pending for judgment at the date of the passage of said repealing act. Therefore, *quoad* the relators' rights which had been adjudged to exist prior to the repealing act and *quoad* the relators' case then pending awaiting judgment, the repealing act is by the very terms of Section 2934 without force or effect.

Memphis vs. United States in Point and Controlling.

The case of *Memphis vs. United States*, 97 U. S., 293 (1887), is "on all fours" with the present case and requires an affirmance of the judgment of the Supreme Court of the Territory of Arizona now on appeal. Shortly, the facts were these: In 1867, one Brown made a contract with the city of Memphis to pave certain streets. When that contract was made the previous act of February 13, 1854, was in force, which limited the city in the levy of a tax for all purposes to a certain specified rate. Under the said act of 1854 or other legislation in force at that time, and down to 1873, there were provisions for assessments upon the property owners for improvements, as security for the payment of such improvements as Brown had made. Brown did the work while these provisions were in force, and when it came time for payment that security failed. This was all prior to the act of March 18, 1873. Then came this act of March 18, 1873, after Brown had done all his work, which act provided that:

"the said city shall have the power to levy a tax, in addition to all other taxes allowed by law, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made," etc.

Afterwards—to wit, March 16, 1875, Brown obtained, in the Federal Courts, a decree against Memphis for the payment to him of a specified amount of money for materials furnished and work done under the contracts of 1867 for paving certain streets. Execution was issued and returned "No property found." March 22, 1875, Brown applied for an *alternative* writ of mandamus to compel the city to pay the decree, or, in default thereof, to levy and collect, as authorized by the said act of March 18, 1873, a tax, in addition to all other taxes, sufficient to pay his judgment. On March 20, 1875, the legislature, by an act passed that day, but which was approved by the Governor and took effect on the 23d day of March, 1875, unconditionally repealed the said act of March 18, 1873. The alternative writ of mandamus above mentioned was issued on March 26, 1875 (97 U. S., at p. 285), and on the same day the city filed an answer setting forth that its treasury was empty and its power of taxation, which for general purposes was limited to one per cent, exhausted, and that it was a misdemeanor to apply special taxes for any other object than that for which they had been levied, and that the said act of March 18, 1873, had been repealed, etc., etc. (See, for above facts, 97 U. S., pp. 285–295.)

The Code of Tennessee, Section 49, concerning the effect of repealing statutes, as quoted by the Court, page 298, was as follows :

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

It was held by the Supreme Court of the United States (*Memphis vs. United States*, 97 U. S., 293,) that the repealing act did not become a law until it was approved by the governor on March 23, 1875, and that prior thereto Brown, by his decree and application for mandamus, which was a proceeding commenced by virtue of the act of March 18, 1873, had acquired a vested right, which was not defeated by the repealing act approved March 23, 1875, to have a tax, payable in lawful money, levied sufficient to pay his judgment, although it required the levy of a tax beyond the rate limited in the act of 1854, which was in force in 1867 when Brown's contract was made.

It rarely chances that two cases occur so closely parallel in their facts and identical in their principles. We cannot set forth at length in this brief the unanimous opinion of this Court as delivered by Mr. Justice STRONG. A few extracts must suffice. They afford a complete answer to the point urged in the brief of the learned counsel for the defendants in the present case (*Ford's brief, pp. 59-65*), that the relators in the present case, by virtue of their application under the acts of Congress and the Territorial legislature for a mandamus to compel the funding of their bonds, and by virtue of the judgment and opinion of this Court that they were entitled to have their bonds funded, nevertheless had, at the time of the territorial repealing act of March 13, 1899, no "right" which it was not competent for the Territorial legislature to take away by repeal. Mr. Justice STRONG, speaking of the

Tennessee act of March 18, 1873, which empowered the city to levy a tax in addition to all other taxes sufficient to pay Brown's judgment, and of his application for a mandamus, and of the repeal, after such application, of the said act of March 18, 1873, says (p. 295):

"It is claimed, however, that it [Act March 1873] was repealed before the Circuit Court awarded the *mandamus*, and what was the effect of that legislative action upon the power of the court in this case becomes therefore a very important question. It is an acknowledged principle that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and that the legislature of a State cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is in effect a part of the contract. But it is not so clear that when a new remedy is authorized after a contract has been made, that remedy may not be wholly taken away by the legislature, before any vested rights have been required under it. In such a case the parties did not contract with reference to it, and it did not enter into their agreement. It had nothing to do with the obligations they assumed. It is, however, no less true that vested rights may be acquired by the creditor under it and by virtue of it; and when such rights have been acquired, they are beyond the reach of the legislature, and the repeal of the law will not affect them. As to them the law continues in force, notwithstanding its repeal.

"In this case the relator recovered his judgment against the city on the 16th of March, 1875. * * *

"After the judgment was obtained an execution was issued to collect the amount of it, and on the 22d of March, 1875, the alternative *mandamus* was issued [see page 285, where it says the alternative writ was issued March 26, 1875,] to compel the levy of the tax of which the city now complains. It was not until after all this that the act of March 18, 1873, was repealed. The act repealing it was approved by the governor on the 23d of March, 1875, and it became a law only from the time of his approval."

After referring to a provision of the constitution which forbids retrospective legislation, Mr. Justice STRONG says, (p. 297):

"If with this be considered the declaration of the Constitution that no retrospective law, or law impairing the obligation of contracts, shall be made, the conclusion is inevitable, that the repealing act had no effect upon anything that was done before March 23, 1875. **But before that day we think the relator had acquired a vested right by his judgment and his alternative writ of mandamus to have a tax levied sufficient to pay the debt due to him from the city,—a right of which he could be deprived by no subsequent action of the legislature.**

"We do not deny that it is competent for a legislature to repeal an act, which, when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it. But such, we think, is not this case. Indeed, there are very strong reasons for holding that the act of March 18, 1873, never was a gratuity."

After stating such reasons he proceeds (p. 298):

"But, if we are in error in this, it is still enough that by his judgment and his writ of *mandamus* he [Brown] acquired a VESTED RIGHT to have the tax collected which the writ ordered."

The facts showing the "vesting of the right" are thus stated by Mr. Justice STRONG (p. 285.)

"March 22, Brown applied for an alternative writ of *mandamus* to compel the city to pay the decree." * * * "The writ issued March 26, and on the same day the city filed an answer."

The fact was, therefore, that at the time of the passage of the repealing act of March 23, 1875, Brown had

only applied for a writ of mandamus, or at most only an alternative writ had been issued, and no return or answer had been made thereto. The alternative writ of mandamus, however, is practically only an order to show cause, and that case, therefore, had not proceeded through the same stages as ours had when the so-called " repealing act " of Arizona of March 13, 1899, was enacted, for at that time we had the decision of this Court, rendered January 3, 1899, that the relators were entitled to have their bonds funded.

One other observation was made. In the federal courts and under the legislation applicable to those courts, as is well known, it is necessary for a relator to get a judgment in order to establish his right, and the application for mandamus is simply the means of enforcing his right. The judgment, therefore, in the case of Brown against Memphis only established his claim *in personam* against the city. In a word, it only established his right. He had yet to apply for his mandamus to compel the city to levy the tax and pay the money, as required by the statutes. In the present case the validity of these bonds, and the right to have these bonds funded, were established by the act of Congress, approved June 6, 1896, and so this Court decided in the decision which it rendered January 3, 1899, and all that remains for the holders of these Pima County bonds to do, as this Court also decided, was to present their bonds to the Loan Commissioners of the Territory for funding, and this the bondholders did, and, when the funding was refused, applied for a mandamus to compel such funding, and such application for a mandamus, and the decision of this Court that such funding should take place, occurred long prior to any attempted repeal by the Territorial act of March

13, 1899. If, therefore, Brown by his judgment and application simply for an alternative mandamus acquired, as this Court in the *Memphis case, supra*, says he did, a vested right, *a fortiori*, the right of these relators was vested long prior to the Territorial repealing act of March 13, 1899.

This Court also held that the repealing act approved March 23, 1875, had no effect upon the "right" of Brown to have his mandamus proceeding carried into effect because of the savings contained in Section 49 of the Code of Tennessee above quoted, which is almost literally the same as Section 2934 of the Arizona Statute above quoted. Referring to said Section 49 of the Code of Tennessee as to the effect of the repealing statute approved March 23, 1875, Mr. Justice STRONG proceeds:

> "Thus [that is, by virtue of the said Section 49] has been established a rule for the construction of repealing statutes. If now the rule be applied to the act of March 23, 1875 [the repealing act] it is manifest that act did not affect any right that had before its passage accrued to Brown, the relator, under or by virtue of it, or any proceeding commenced by him under it. But certainly under his judgment recovered in 1875 he had a right to have a tax levied sufficient to pay it, so long as the act of 1873 remained in force, and he had the right *in virtue of that act*. So when the alternative *mandamus* was issued March 22, 1875, a proceeding was commenced under or by virtue of the statute."

We rely with confidence on the foregoing case as establishing that the Arizona repealing act of March 13, 1899, is without effect on the relators' rights on three grounds:

1. The relators' rights were vested before said repealing act was passed, and could not be destroyed or affected by the repealing act, irre-

spective of the saving provisions of Section 2934 of the Arizona statutes.

2. The relators' rights were saved by the said Section 2934, saving "any right then already existing or accrued," even if they would not be vested independently of Section 2934.
3. They were also saved by the clause in Section 2934, saving rights acquired in any pending "action or proceeding theretofore taken," *i. e.*, taken before the repealing statute was enacted.

The argument of counsel for the defendants is that the "action" or "proceeding" must have resulted in a judgment prior to the repealing statute in order that the right should be saved by said Section 2934. Obviously this cannot be the case, as such a statute would be useless, and the words "action or proceeding theretofore taken" would be wholly superfluous. Counsel for the defendants would have the Court substitute for the words "action" or "proceeding" taken prior to the repealing statute, "judgment obtained," or "proceeding completed"; but obviously no statute is needed in order to save the rights perfected in a judgment already rendered or a proceeding wholly completed.

The effect of such a statute as Section 2934 of the Arizona Statute, above quoted, has been many times passed upon. We cite one recent case in the Court of Appeals of the State of New York, *Village of Champlain vs. McCrea*, 165 N. Y., 264. The provision of the New York statute corresponding to that of the

Arizona statute above quoted is quoted by the New York Court of Appeals as follows (pp. 270, 271):

"The respondent insists that as the Village Law (Chap. 414, Laws of 1897) took effect July 1st, 1897, it was not competent for the appellant to file on the 2d day of July, 1897, the map and order under the law of 1875, as the Village Law covered the same subject and in express terms repealed chapter 181, Laws of 1875. It is further argued that in order to render these condemnation proceedings regular, the water commissioners should have filed a map and plans with the village clerk, and a certified copy of the map in the county clerk's office in pursuance of section 223 of the Village Law of 1897.

"The objection which was sustained by the Appellate Division, rests upon a misapprehension of the legal situation. **The inauguration of a water system for the Village of Champlain, having been duly instituted under the act of 1875, is entitled to be carried to a final conclusion under that statute, notwithstanding the enactment of the Village Law and the repeal by it of the law of 1875.**

"The Statutory Construction Act (Chap. 677 of the Laws of 1892) provides (§ 31) as follows: 'The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected; and all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed' (*People ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 570).

"This principle of construction has been frequently applied, not only under the Statutory Construction Act, but prior thereto in repealing acts containing saving clauses (*Cameron v. N. Y. & Mount Vernon Water Co.*, 133 N. Y., 336; *Close v. Noye*, 147 N. Y., 597).

"The map and order filed on the second of July, 1897, under the act of 1875, was required to be filed in the office of the county clerk only by the provisions of section 5, and, consequently, is not open to the criticism that it should have been filed in the office of the village clerk. The map is in conformiiy to the act of 1875."

If the whole matter of refunding territorial and municipal indebtedness is not made, by the several acts of Congress, a matter beyond the power of the Territorial Legislature, nevertheless the utmost effect that can be given to the repealing act of March 13, 1899, is that it abolishes the powers of the loan commissioners to issue refunding bonds in the future or generally; but, if the said repealing act is effective to this extent, nevertheless it cannot, under the express provisions of the act of Congress of June 6, 1896, and the saving clauses in Section 2934 of the Revised Statutes of the Territory of Arizona, "affect the relator's rights as they existed at the date of the repealing act," or affect the relator's case then pending and awaiting judgment, as to which "right" and as to which "action or proceeding" the statutes as they existed at the date of the said repealing act remain in full force and effect.

The decisions cited by the learned counsel for the defendants (Ford's Brief, pp. 63–68), we find after examination, were either made in jurisdictions which had no such statute as that of Arizona, saving rights, pending actions, proceedings, etc., in case of repeal of a statute, or under statutes materially different from the Arizona statutes.

(3) There is also another conclusive reason why the attempted repeal of this statute cannot affect our right to have these funding bonds issued—namely, that our right had accrued—and we had the decision of the Supreme Court of the United States that the bonds be issued, prior to the passage of said repealing act. This right adjudicated by this Court to exist cannot be taken away by any act of the Territorial Legislature. And this is true independently of the provisions of Section 2934 of the Revised Statutes of Arizona.

That the Legislature of the Territory of Arizona has no power to pass legislation to annul or defeat a judgment of the Supreme Court of the United States or a right established by such judgment or under a pending judicial suit or proceeding, is obvious. On this point we merely call the attention of this Court to the language of Chief-Justice MARSHALL in *United States vs. Peters*, 5 Cranch, 115, where he said (p. 136):

> "If the legislatures of the several States may at will annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

See, also, on this point the case of *Memphis vs. United States, supra* (pp. 100–106).

(4) Furthermore, this so-called repealing act attempts to repeal only section one of the old Territorial funding act of 1887, and section one of the Territorial act of March 19, 1891, and does not repeal,

or attempt to repeal, the funding act of Congress of June 25, 1890, nor any other act of Congress, nor does it mention any act of Congress, and it does not even repeal or attempt to repeal, any other parts of the old Territorial funding act of 1887, and of said act of March 19, 1891, except section one of the said act of 1887, and section one of said act of March 19, 1891. Therefore, even on the defendants' own theory, all the other parts of the said funding acts of 1887, and of the said act of March 19, 1891, except only sections one thereof, stand unrepealed, and these acts, if so unrepealed. as well as the acts of Congress, leave in full force and effect sufficient provision for the issuance of these bonds, so that there is full authority for the issuance of the said bonds without looking to the said sections one of the Territorial funding act of 1887, and of the Territorial act of March 19, 1891.

Even if the view presented by the defendants—namely, that the repealing act of March 13, 1899, repealed section one of the funding act of Congress of June 25, 1890, as well as section one of the funding act of the Territory of 1887, and section one of the Territorial act of March 19, 1891, were the correct view (and it is not), still the remaining and unrepealed provisions of the said act of Congress of June 25, 1890, and the said Territorial act of 1891, and the said Act of Congress of June 6, 1896, fully authorize and require the funding of the bonds in question.

The learned counsel for the defendants erroneously assume that the terms of the said repealing act of March 13, 1899, repeal *all* of the funding act of the Territory in the Revised Statutes of Arizona of 1887, and *all* of the act of the Territory of March 19, 1891. This, however, is not the fact. The said act of 1899 does not repeal, or attempt to repeal, any part of the funding act in the Revised Statutes of Arizona of 1887, except Section 1 (2039) thereof. Said repealing act of 1899 does not even mention the funding act of Congress of June 25, 1890; and it does not repeal any part of the Territorial act of March 19, 1891, except section one.

Even if the said act of 1899 were to be regarded as repealing section one of the funding act of Congress of June 25, 1890, still all the remaining provisions of the said funding act of June 25, 1890, remain in full force and effect. Not only so, but the said repealing act, in dealing with the territorial funding act approved March 19, 1891, repeals only section one of the said act of 1891; and all the remaining provisions of the said act of 1891 remain unrepealed. Even if it be assumed that both section one of the funding act of Congress of June 25, 1890, and section one of the territorial funding act approved March 19, 1891, are repealed, there remain in the said funding act of Congress approved June 25, 1890, and in the said territorial funding act approved March 19, 1891, full powers and provisions for the funding of the bonds now in question, which is funding required by this court and by the Congressional act of June 6, 1896, which is in full force, not even attempted to be repealed. Section seven of the said territorial funding act approved March 19, 1891, is as follows:

"Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act at not less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

This court, in the former appeal in the present case (*Utter vs. Franklin*, 172 U. S., 416, 425), referring to this section, expressly held that it required the funding of these bonds. Furthermore, section ten of the act of Congress of June 25, 1890—and there has been no repeal or attempted repeal of this section—expressly authorized such funding, as this court expressly held on the former appeal in this case (*ibid*).

All the provisions of the act of Congress of June 25, 1890, as to the method of issuance of the bonds, signatures, place of payment, medium of payment, etc., etc., are still in full force and unrepealed.

The Territory of Arizona, the obligor in these bonds, is still in existence. The bonds to be issued are not the bonds of the loan commission, but the bonds of the Territory. The Governor, the Territorial Auditor and the Territorial Secretary are still in existence, as also the Territorial Treasurer.

There is no magic in the words "Loan Commissioners." These officers were in existence before these acts were passed, and they still remain in existence, and the calling of them "Loan Commissioners" in this section does not make them any more or any less the officers of the Territory. All that this section does is to provide that these three officers—the Governor,

Territorial Auditor and Territorial Secretary—shall be called " Loan Commissioners."

Even if section one of the act of Congress of June 25, 1890, were to be considered as repealed (and clearly it is not), still all the remaining sections of the said act of Congress approved June 25, 1890, and all the sections of the funding act of Arizona approved March 19, 1891, except section one, are in full force and unrepealed, and all of these sections must be regarded as in full force and effect, and so treated, and their provisions must be given full force and effect. Thus, section seven of the Territorial act approved March 19, 1891, expressly requires, as this court held on the former appeal in this case, that the Territorial bonds be issued in exchange for these present county bonds. This section, we say, is in full force and unrepealed, and effect must be geven to it.

If the Territorial Legislature of 1899 repealed section one of the act approved March 19, 1891, and repealed section one of the funding act of Congress approved June 25, 1890, *then it also equally left unrepealed all the other sections of the said acts*, and such a construction must be placed on them as will leave these other sections as well as all of the Act of Congress of June 6, 1896, which provides that these bonds shall be funded in full force and effect according to their terms.

The officers who are to issue these bonds are the Governor of the Territory, the Territorial Auditor and the Territorial Secretary, and also the Territorial Treasurer. As above stated, all these officers exist, and the Territory still exists. They can issue these bonds as provided in the said section seven of said Act of 1891, and in said section ten, and other sec-

tions, of the said Act of Congress of June 25, 1890, as directed by the said Act of Congress of June 6, 1896.

Such a construction should be placed upon these acts as will give full force and effect to the unrepealed sections. If section one of the act of 1887 (otherwise known as 2039, Revised Statutes of 1887), and so, also, if section one of the Act of Congress of June 25, 1890, be carefully examined, it will be seen that all that those sections do is to provide that certain officers of the Territory already in existence shall constitute a board of commissioners to be styled the "Loan Commissioners of the Territory of Arizona." These officers, namely, the Governor, the Territorial Auditor and Territorial Secretary, were in existence before the sections one were adopted, and they still continue in existence, even if it be conceded that the said section one of the funding act of 1887, or the said section one of the funding act of Congress of June 25, 1890, or both, has been repealed.

V.

The Supreme Court of the Territory was correct in holding that the interest, and all the interest, on these bonds, should be funded as well as the principal of the bonds.

The act of Congress approved June 6, 1896, expressly provides that these bonds "shall be funded *with the interest thereon which has accrued and may accrue* until funded into the lower interest bearing bonds, as provided by this act."

This act of June 6, 1896, validated these bonds and all the interest thereon, the interest already accrued and that yet to accrue, and directed that both the principal and all this interest be funded. No distinction was made by the said act of Congress between different parts of the interest which had accrued, but all of it was validated and directed to be funded. The language of the act of Congress is, "the interest thereon which has accrued and may accrue until funded." This includes all interest which had accrued on the said bonds, and the Supreme Court of the Territory rightly so held.

It is not here a question of any statute of limitations. These bonds, as this court has held, were not valid until they were validated by the said act of Congress approved June 6, 1896. Inasmuch as the said bonds and the interest thereon were then for the first time valid, and inasmuch as the statute expressly directs that the said bonds "with the interest thereon which has accrued and may accrue" shall be funded, and inasmuch as this language embraces all the interest which has accrued, without any distinction, this express provision of the act of Congress controls, and no statute of limitations has anything to do with the matter.

But even if it were to be assumed that any statute of limitations might apply, yet, inasmuch as these bonds and the interest thereon were not valid until they were validated by the act of Congress approved June 6, 1896, *no action could have been brought on the said bonds or interest until June 6, 1896.* Inasmuch, therefore, as no action could have been brought until June 6, 1896, on the said bonds and interest, no statute of limitations would begin to run

until June 6, 1896. This is on the familiar principle that the statute of limitations does not in any case begin to run until a right of action accrues. Even if, therefore, it be assumed that a statute of limitations would begin to run on June 6, 1896, still none of these bonds and no interest thereon have been outlawed, because this proceeding to have these bonds funded was begun in December, 1896, long within the period when the statute of limitations could have affected these bonds or the interest thereon.

This decision of the Supreme Court of the Territory as to funding the accrued interest on the bonds is in accordance with the decision of this court on the former appeal. When this case was here before this court said in *Utter vs. Franklin*, 172 U. S., 416:

"The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent. bonds and coupons issued in July, 1883, in compliance with the act of the Territory 'to promote the construction of a certain railroad,' approved February 21, 1883, aggregating, including principal *and interest thereon*, the sum of $289,964.50."

This court, after considering the case, then expressly stated at the conclusion of its opinion (p. 425):

"In addition to this, however, the act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities shall be funded *with the interest thereon*, etc.

"We are, therefore, of opinion that it was made the duty of the loan commissioner by these acts to fund the bonds in question."

On this former appeal no distinction was made by this court as to any different parts of the accrued interest, and none can be made now. What was said by

this court in the similar case of *New Orleans vs. Warner*, 180 U. S.,199, 203, applies here:

"It should be stated, in this connection, that no such distinction between different classes of warrants, as is now made, was called to the attention of this court when the case was here upon questions certified, 167 U. S., 467, or upon the merits, 175 U. S., 120. In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defense as to a part of these warrants after the merits of the case have been fully considered and disposed of. This is impossible. *Yazoo, &c., R. R. Co. v. Adams, ante*, 1; *Supervisors v. Kennicott*, 94 U. S., 498."

The decision of the Supreme Court of the Territory, requiring the funding of all the interest on these bonds is, therefore, clearly correct.

VI.

The plaintiffs can maintain this proceeding as the holders of these bonds, although they are not the beneficial owners of all the bonds in question.

It has been suggested by the learned counsel for the defendants that this mandamus proceeding cannot be maintained, because the plaintiffs in the suit are not the beneficial owners of all the bonds and coupons on which this mandamus proceeding is brought. The facts are that James L. Utter owned in his own right four of the bonds in question, and Elizabeth B. Voorhies (who was one of the original

plaintiffs in the suit, and whose executors, George Albright *et al.*, have been substituted by order of this court and the Supreme Court of the Territory, in her place) owned thirty of these bonds, and that all of the owners of the other bonds delivered their bonds and coupons (all of which are payable to bearer) to W. N. Coler & Company, to be delivered to James L. Utter and Elizabeth B. Voorhies for the express purpose of having them refunded. These bonds were all payable to bearer, and a suit could be brought on them by any person who held them. See Section 121, Revised Statutes of Arizona, 1887, p. 69:

"Any person to whom any of the said negotiable instruments may have been assigned may maintain an action in his own name which the original obligee or payee might have brought," etc.

There is no possible objection to transferring these bonds to Mr. Utter and Mrs. Voorhies (now Mrs. Voorhie's executors) for the express purpose of bringing this suit thereon. These bonds are payable to bearer, and are negotiable, and the title thereto passes by delivery. The statutes of Arizona, above quoted, expressly provide that the assignee of a negotiable instrument may sue in his own name. Furthermore, the courts in Arizona are courts of general jurisdiction so far as respects the persons who may sue therein.

This case, therefore, is precisely like the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case this court held that where bonds and coupons had been delivered to the plaintiff (p. 347) "*solely for the purpose of bringing suit on the coupons*," nevertheless (so far as the citizenship of the parties permitted a case to be brought in the federal court, and a question as to citizenship of parties does not arise in the

Arizona Territorial Court, for that is a court of *general* jurisdiction, so far as parties are concerned), there was no objection to such a suit being maintained by a person to whom the coupons had been transferred solely for the purpose of bringing suit thereon. On this point this court said (p. 356):

"But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned either by themselves or by other citizens of New York or Pennsylvania to a sufficient amount by each owner to sustain the jurisdiction of the circuit court (*Thompson v. Perrine*, 106 U. S., 589; *Chickaming v. Carpenter*, 106 U. S., 663; *Douglas' Commissioners v. Bolles*, 94 U. S., 104, 109; *Cromwell v. Sac County*, 94 U. S., 351, 360)."

The very object of making such instruments payable to bearer is that they may be passed from hand to hand by delivery, so that the person in whose possession they are has a good title thereto. Furthermore, it would be putting the holders of these bonds to an unnecessary and useless expense for each and every one of these holders of bonds himself to take his particular bond down to Arizona to have it funded and to have them bring twenty or thirty different suits thereon in case the funding of these bonds were refused.

In *Commissioners of Douglas County vs. Bolles*, 94 U. S., 104, the facts in this respect are precisely like the present. They are stated by Mr. Justice STRONG as follows (p. 109):

"They [the plaintiffs] are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, *who deposited them with the plaintiffs for collection*, taking a receipt. There is no evidence when or for what consideration those other persons purchased,

and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds."

This Court held that the plaintiffs in that suit, who thus held coupons, some of which were deposited with them for collection, were entitled to maintain suit thereon. The case, therefore, is directly in point.

So, also, in *Lanier vs. Nash*, 121 U. S., 404, this Court held that a person to whom a note had been transferred (p. 410), "*so that suit can be brought by you, if necessary*," could bring suit on the said note, and such a suit would be regarded as a suit by a trustee for the benefit of the real owners of the note.

Of course a further question which was raised in this case of *Lanier vs. Nash*, that the transfer and suit might have been contrary to the act of March 3, 1875, relating to the jurisdiction of circuit courts of the United States (but which this Court held was not contrary to the act in that particular case), has no bearing on this present case, for the reason that the Supreme Court of the Territory of Arizona is a court of *general* jurisdiction, at least so far as *parties* are concerned.

See, also, *Montclair vs. Ramsdell*, 107 U. S., 147, in which this court held and stated the established doctrine that the holder of a negotiable instrument could maintain an action thereon without showing that he paid any value therefor, and that any holder of negotiable paper who had paid value therefor could transfer it to any one without receiving value therefor, and the latter could maintain an action thereon.

This question has been well stated by the United States Circuit Court of Appeals for the Sixth Circuit

in *Village of Kent vs. Dana*, 100 Federal Reporter, 56, in which case SEVERNES, District Judge, giving the opinion, said (pp. 63, 64) :

"3. Upon the question of the right of the plaintiff to bring the action we think there is no difficulty. Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in order to let in any defense which it might have as against the bank; but it had no further interest in the matter. Assuming that the savings bank delivered these coupons to Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank and take up his check—which is a construction of the evidence as favorable to the defendant as it would bear—still, this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a *bona fide* holder, he would recover in that character. The title to negotiable paper payable to the bearer passes by delivery, unless the attendant circumstances show that such was not the intention. But here the bank transferred these coupons for the purpose of enabling him to bring suit. It is implied in that that such title should pass as would enable him to sue, for without it the object of the transfer could not be accomplished. Possession of such paper where it is payable to bearer, or where it is payable by indorsement to the holder, coupled with an authority to bring suit upon it, is sufficient for that purpose. In *Law vs. Parnell*, 7 C. B. (N. S.), 282, the action was brought in the name of an agent as custodian of paper held for another, but indorsed in blank, the agent being authorized by his principal to bring suit upon it. It was held that he had sufficient title to maintain the suit, EARLE, C. J., saying :

"'The bill being indorsed in blank, the bank had the right to hand it over to a third person to sue upon it without indorsing it; and, therefore, the plaintiff, if he was the lawful holder of the bill and had authority from the bank to do so, had a perfect right to sue upon it.'

"This case was directly approved in *O'Brien v. Smith*, 1 Black, 99; 17 L. Ed., 64; where the suit was

brought by the cashier of a bank upon a note belonging to it, but of which he had control for its use. In affirming a recovery against the objection that the plaintiff could not recover in his own name, Chief-Justice TANEY, speaking for the court, said:

"'The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss these questions, which we consider as too well settled to be now open to serious controversy.'

"The case of *Boyd v. Corbitt*, 37 Mich., 52, is precisely in point. There Boyd, who was a collecting agent for one Martin, received from him a note indorsed in blank, and brought suit thereon in his own name, and it was held that he had sufficient title on which to maintain the suit.

"Where, as in Ohio, the Code of Procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor (*White v. Stanley*, 29 Ohio St., 423; *Eaton v. Alger*, 47 N. Y., 345; *Hays v. Hathorn*, 74 N. Y., 486; *Cottle v. Cole*, 20 Iowa, 481)."

The learned counsel for the defendants, in their brief, refer to the part taken by the firm of W. N. Coler & Company, of New York, in regard to gathering together these bonds and having them presented for funding as provided in the act of Congress of June 6, 1896. They seem to think that such conduct on the part of W. N. Coler & Company is reprehensible, for some reason or other which said counsel do not explain. On the contrary the fact is that the conduct of W. N. Coler & Company in this matter of getting these bonds refunded is deserv-

ing of praise and commendation. Said firm is and has been a reputable banking and bond-dealing house in the city of New York. That firm purchased these bonds and sold them to numerous customers of their (list of owners of these bonds, Record, pp. 104, 105). Naturally enough, when the county repudiated these bonds these same customers came back to W. N. Coler & Company, and asked their advice and assistance in the matter of having these bonds paid or funded. For the firm of W. N. Coler & Company not to have given such assistance would have been contrary both to business usage and to their moral obligations to their customers. W. N. Coler & Company, therefore, deserve praise and commendation for their action in the matter, and there is no occasion whatever for the derogatory remarks of the counsel for the defendants in respect of such action.

VII.

For the foregoing reasons the judgment of the Supreme Court of Arizona ought to be affirmed.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
WM. H. BARNES,
Counsel for Appellees.

APPENDIX.

[Revised Statutes of Arizona, 1887, pp. 410, 411.]

TITLE XLV.

MANDAMUS.

[Approved March 8, 1887.]

2335. (SEC. 1.) The writ of *mandamus* may be issued by the supreme or district court to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

2336. (SEC. 2.) This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

2337. (SEC. 3.) The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.

2338. (SEC. 4.) When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be

allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not.

2339. (SEC. 5.) On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

2340. (Sec. 6.) If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him.

2341. (Sec. 7.) On the trial the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

2342. (Sec. 8.) If either party be dissatisfied with the verdict of the jury, he may move for a new trial.

2343. (Sec. 9.) If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party a new trial shall not be had.

2344. (Sec. 10.) If no motion for a new trial be made or if denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the trial; after which either party may bring on the argument of the application upon reasonable notice to the adverse party.

2345. (SEC. 11.) If no answer be made, the case shall be heard on the papers of the applicant. If an answer

be made which does not raise a question such as is mentioned in section six, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements not affecting the substantial rights of the parties, the court shall proceed to hear, or fix a day for hearing, the argument of the case.

2346. (SEC. 12.) If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the court or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay.

2347. (SEC. 13.) The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court.

2348. (SEC. 14.) When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the territory or county, a certified copy of the order shall be forwarded to the territorial or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer.

[Took effect July 1, 1887.]

Act of Congress approved June 25, 1890.

[The Italics show new provisions made by Congress. The brackets show provisions in the Territorial Funding Act of 1887 which Congress did not adopt.]

An Act approving, with amendments, the funding act of Arizona (26 Stat. 175).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as "Title XXXI., Funding," be, and is hereby amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future Territorial legislation:

"TITLE XXXI.—FUNDING *AND LOAN.*

"Chapter One.

"TERRITORIAL, *County, Municipal, and School District* INDEBTEDNESS.

"Par. 2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona *and such future indebtedness as may be or is now authorized by law*, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

"Par. 2040 (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, *or that is now, or may be hereafter, authorized by law* and for the purpose of paying, redeeming,

and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due *or is now or may be hereafter authorized by law*, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

"Par. 2041 (Sec. 3). Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed *five* [six and one-half, (6½)] per centum per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, *or such place* as may be designated by the said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States *fifty* [within twenty-five] years after the date of their issue. *Said Territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.*

"They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for *the* [that] purpose, *which shall state amount sold for, or, if exchanged, for what;* and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

"Par. 2042 (Sec. 4). Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond.

"They shall be consecutively numbered and bear the same number of the bond to which they are at-

tached, and shall be signed by the Territorial treasurer.

"The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

"Par. 2043 (Sec. 5). Whenever the said loan commissioners *may be authorized by law to issue bonds*, or shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, [the rate of interest they shall bear] the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the [highest] bidder or bidders therefor *bidding the lowest rate of interest: Provided*, That said loan commissioners shall have the right to reject any and all bids: *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

"Par. 2044. (Sec. 6.) When *the* [a] sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the Territorial auditor, *countersigned by the governor*; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

"They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds [issued under this act] delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

" Par. 2045 (Sec. 7). The Territorial treasurer shall sell said bonds for cash or exchange them for any of the [Territorial] indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any [Territorial] indebtedness be redeemed at more than its face value and any interest that may be due thereon.

" *That* [The] said treasurer shall endorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

" Par. 2046 (Sec. 8). [All] Moneys [so] received by said treasurer [from a sale of such bonds] shall be applied by him [exclusively] to the redemption of the [Territorial] indebtedness for the redemption of which [such] bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

"*Before any such indebtedness shall be paid the Territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record therof.*

" Par. 2047 (Sec. 9). There shall be levied annually upon the taxable property in this Territory, and in addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act

to be placed *in the Territorial treasury in the* [by the Territorial Treasurer in a] fund to be known as the 'Interest Fund.' And *fifty* [ten] years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged; *nothing herein contained shall be construed to prevent the legisature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity.*

"The Territorial board of equalization, *or, on their failure,* [if there be one, if not, then] the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county *and to the municipal or school authorities;* and the said board of supervisors *or authorities* are hereby directed and required to enter such rate on *their* [the] assessment *rolls* [roll of their respective counties] in the same manner and with the same effect as is provided by law in relation to other Territorial, [and] county, *municipal and school* taxes. Every tax levied under the provisions *of* [or] authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

"All moneys derived from taxes authorized by [the] provisions of this act shall be paid into the Territorial treasury and shall be applied—

"FIRST. To the payment of the interest on the bonds issued hereunder.

"SECOND. To the payment of the principal of such bonds: *Provided,* That all moneys remaining in the interest fund after the payment of the interest [in each year, for the first ten years after the issuance of any bonds under this act,] and all moneys remaining in the 'redemption fund' after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial 'general fund.'

"Par. 2048 (Sec. 10). Whenever, after the expiration of the *fifty* [ten] years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the

duty of the Territorial treasurer to advertise as in *the manner of* [manner of the] advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisement shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

"*The boards of supervisers of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other Territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law to said county, municipality or school district, upon official demand by said authorities; the county, municipality or school district to pay into the Territorial treasury, in additional to all other taxes authorized by law, such amounts as may be directed by the Territorial board of equalization, or on their failure by the Territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding or*

other bonds issued to such county, municipality or school district when the same shall become due and in addition a rate of interest paid by the Territory on such bonds.

" Par. 2049 (Sec. 11). When the treasurer pays or redeems any [Territorial] indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words 'redeemed and canceled,' with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under *the* [this] act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or *to* the governor, or a committee of either branch of the legislature, or a joint committee of both.

" Par. 2050 (Sec. 12). It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund [which said interest warrant shall be drawn at least one month previous to the maturing of the interest].

" Par. 2051 (Sec. 13). It shall be the duty of said [board of] loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

" Par. 2052 (Sec. 14). No bond issued under the provisions of this act shall be taxed within this Territory.

" Sec. 15. *That nothing in this act shall be construed to authorize any future increase of any indebtedness in excess of the limit prescribed by the 'Harrison act': Provided, however, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on Territorial, county, municipal and school*

government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act.'

That all acts or parts of acts in conflict with this act are hereby repealed.

Approved June 25, 1890.

The Validating and Funding Act of Congress of June 6, 1896 (29 Stats., 262).

"*An Act amending and extending the provisions of an Act of Congress, entitled 'An Act approving with amendments the funding Act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894,*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the Acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the Act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the Act of Congress

approved June 25th, 1890, and the Act amendatory thereof and supplemental thereto approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this Act provided until January 1st, 1897: *Provided*, That nothing in this Act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this Act approved, confirmed and made valid, and authorized to be funded.

"Approved June 6, 1896."